SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~339~~ 15

STELLA HUGHES, PETITIONER,

vs.

WASHINGTON.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

PETITION FOR CERTIORARI FILED JULY 12, 1966
CERTIORARI GRANTED JANUARY 9, 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 339

STELLA HUGHES, PETITIONER,

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

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[fol. 2]

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR PACIFIC COUNTY

STELLA HUGHES, Plaintiff,

vs.

STATE OF WASHINGTON, Defendant.

SUMMONS—Filed November 13, 1962

The State of Washington, to the said State of Washington Defendant .

You are hereby summoned to appear within twenty days after the service of this summons upon you, exclusive of the day of service, if served in the State of Washington, and within sixty days exclusive of the day of service if served without the State of Washington, and defend the above entitled action in the court aforesaid; and answer to the complaint of the Plaintiff and serve a copy of your answer upon the undersigned attorneys for the said Plaintiff at their office below stated, and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint which will be filed with the clerk of said Court, and a true copy of which is herewith served upon you.

Charles B. Welsh, Attorneys for plaintiff, Post Office and Office Address, 1112 W. Water St., South Bend, Washington.

Service acknowledged, Sept. 20, 1962.

Charles Bhoc Jr., Assistant Attorney General.

[File endorsement omitted]

[fol. 3]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR PACIFIC COUNTY

No. 14546

[Title omitted]

COMPLAINT—Filed November 13, 1962.

Comes now plaintiff and for cause of action alleges:

1.

That plaintiff individually is the owner in fee simple title and in possession of the following described real property, to-wit:

> Beginning at a point 1353 feet north from the line between Sections 4 and 9, Township 11 N. R. 11 West W. M. and 437.3 feet west from the west line of State Highway No. 12-A, thence north 226.6 feet, thence west. 300 feet more or less to the line of ordinary high tide of the Pacific Ocean, thence South 226.6 feet, thence East 300 feet more or less to beginning.

2.

That title to the above described real property was originally obtained from the United States government prior to 1889 and the westerly boundary line of said property is a line corresponding to the line of mean high tide of the Pacific Ocean, and that defendant State of Washington claims some right, title or interest easterly of said west boundary line but any such claim on the part of the State of Washington is inferior to the right of plaintiff herein.

[File endorsement omitted]

3.

That plaintiff and her predecessors in interest have been in the actual, open and notorious possession of the above [fol. 4] described real property for more than ten years immediately last past, under the claim and color of title thereto, made in good faith, and during said time have paid all real estate taxes legally assessed thereon, and during said time no other party or parties have claimed or asserted any right, title or interest in and to said property.

Wherefore plaintiff prays that the court enter judgment herein establishing the westerly boundary line of plaintiff's property to the line of mean high tide of the Pacific Ocean and as against any right, title, claim or interest of the defendant, State of Washington.

Charles B. Welsh, Attorney for plaintiff.

Duly sworn to by Charles B. Welsh, jurat omitted in printing.

[fol. 5]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR PACIFIC COUNTY

No. 14546

[Title omitted]

ANSWER AND CROSS-COMPLAINT—Filed November 27, 1962

For answer to the complaint the defendant:

1. Disclaims all interest in the real estate described in paragraphs 1 and 2 of the complaint lying easterly of a line described as follows:

[File endorsement omitted]

Beginning at a point whose Y coordinate is 436,139.17 and whose X coordinate is 1,104.683.64, referred to the Washington Coordinate System, South Zone, and running thence on an azimuth of 1° 14′ 05″ 3412.79 feet to a point whose Y coordinate is 432,727.18 and whose X coordinate is 1,104,610.10, referred to said coordinate system.

2. Admits that it claims an interest in the lands lying westerly of the line described in paragraph 1 of this answer, and as to the lands it claims an interest in, the defendant denies all further allegations of paragraph 1, 2, and 3 of the complaint.

By way of cross-complaint, the defendant alleges:

1. It is one of the sovereign states of the United States of America, admitted to the Union on November 11, 1889.

2. The property described in paragraph 1 of the complaint borders upon the Pacific Ocean. Accretions have formed to the shore and beach of the Pacific Ocean in front of that property both before and after November 11, 1889.

[fol. 6] 3. Repeated court decisions, administrative construction, and legislative action have created a rule of property under state law whereby:

(a) All accretions formed prior to November 11, 1889, belong to the adjoining upland owner;

(b) All accretions formed after November 11, 1889 belong to the State of Washington, subject to the legislative dedication that they constitute a highway to remain forever open to the use of the public, as set forth in Laws of 1901, chapter 110; and

(c) The dividing line between accretions formed before November 11, 1889, and those formed thereafter is the line of ordinary high tide as it existed on that date, is the line which the water impressed upon the soil by covering it for sufficient periods to deprive the soil of vegetation as of

that date, and is that line which is set forth in paragraph 1 of the above answer.

Wherefore, the defendant prays that the line of ordinary high tide of November 11, 1889, as described in paragraph 3 (c) of this cross-complaint and as set forth in paragraph 1 of its answer be established and decreed to be the fixed boundary between the property of the plaintiff and the property of the defendant, and that title to all property westerly of such line be quieted in the defendant State of Washington as against any and all claims of the plaintiff.

John J. O'Connell, Attorney General, By Harold T. Hartinger, Assistant Attorney General, Attorneys for Defendant.

Office & P. O. Address: Temple of Justice, Olympia, Washington.

[fol. 7] *Duly sworn to by Don Lee Fraser, jurat omitted in printing.*

[fol. 8]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR PACIFIC COUNTY

No. 14546

[Title omitted]

REPLY AND ANSWER TO CROSS COMPLAINT—
Filed November 27, 1962

Comes now plaintiff and replying to defendant's answer and answering defendant's cross-complaint admits, denies and alleges as follows:

1.

Admits paragraphs 1 and 2 of the cross-complaint.

2.

Denies paragraph 3 of the cross-complaint.

Wherefore plaintiff prays that defendant's cross complaint be dismissed and that she recover according to the prayer of her complaint.

Charles B. Welsh, Attorney for plaintiff.

Duly sworn to by Charles B. Welsh, jurat omitted in printing.

[File endorsement omitted]

[fol. 9]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR PACIFIC COUNTY

No. 14546

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW
—February 10, 1964

The above entitled matter having come on for trial before the Court on January 23, 1964 and from the record made and arguments of counsel the court finds the following facts to be true:

1.

That plaintiff individually is the owner in a fee simple title and in possession of the following described real property, to-wit:

> Beginning at a point 1353 feet north of the line between Sections 4 and 9, Township 11 N. R. 11 West W. M and 437.3 feet west from the west line of State Highway No. 12-A thence north 226.6 feet thence west 300 feet more or less to the line of mean high tide of the Pacific Ocean, thence south 226.6 feet, thence East 300 feet more or less to beginning.

2.

That title to the above described real property was originally obtained from the United States government prior to 1889 and the Westerly boundary line of said property is a line corresponding to the line of mean high tide of the Pacific Ocean. That mean high tide of the Pacific Ocean is defined as the average elevation of all high tides as

[File endorsement omitted]

observed at a location through a complete tidal cycle of 18.6 years, and the actual western boundary line of plaintiff's property is where that elevation meets the shore as it exists at any particular time.

3.

That since the original survey and establishment of the meander line by the United States government in 1859 [fol. 10] imperceptible accretions have formed in front of the property as hereinabove described, both before and after November 11, 1889 and all of said accretions belong to plaintiff as the upland owner.

4.

That the State of Washington has no right, title, claim of interest in and to said accreted lands or in any part of plaintiff's property lying east of the line of mean high tide as defined herein.

From the Foregoing Findings of Fact the court makes the following conclusions of law: That plaintiff is entitled to judgment quieting title in her against any claim of the State of Washington in and to her property as hereinabove described lying east of the line of mean high tide of the Pacific Ocean as it now or hereafter may exist.

Done in Open Court this 10 day of February, 1964.

Warner Poyhonen, Judge.

Presented by Charles B. Welsh, Attorney for plaintiff.

Approved as to form for entry and notice of presentation waived: Harold T. Hartinger, Assistant Attorney General.

[fol. 11]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR PACIFIC COUNTY

No. 14546

STELLA HUGHES, Plaintiff,

vs.

STATE OF WASHINGTON, Defendant.

JUDGMENT—February 10, 1964

The above entitled action came on for trial before the court, and the court having entered Findings of Fact and Conclusions of Law,

Now, Therefore, It Is Hereby Ordered, Adjudged, And Decreed that plaintiff individually is the owner in fee simple title and in possession of the following described real property situated in Pacific County, Washington, to-wit:

Beginning at a point 1353 feet north from the line between Sections 4 and 9, Township 11 North, Range 11 West, W. M., and 437.3 feet west from the west line of State Highway No. 12-A, thence north 226.6 feet, thence west 300 feet more or less to the line of mean high tide of the Pacific Ocean, thence south 226.6 feet, thence east 300 feet more or less to beginning.

It Is Further Ordered, Adjudged, And Decreed that the western boundary of the foregoing property is the line of mean high tide of the Pacific Ocean as it now or hereafter may exist, which line is the average elevation of all high

[File endorsement omitted]

tides as observed at a location in front of the property through a complete tidal cycle of 18.6 years.

It Is Further Ordered, Adjudged, And Decreed That plaintiff's title is free and clear of any right, title, claim or interest of the State of Washington to any accreted lands [fol. 12] lying easterly of said line of mean high tide.

Done In Open Court this 10 day of February, 1964.

Warner Poyhonen, Judge.

Presented by:

Charles B. Welsh, Attorney for plaintiff.

Approved for Entry and Notice of Presentation Waived: Harold T. Hartinger, Assistant Attorney General, Of attorneys for defendant.

[fol. 13]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR PACIFIC COUNTY

No. 14546

[Title omitted]

NOTICE OF APPEAL—Filed February 19, 1964

To Honorable Irene F. Kellner, Clerk of the Superior Court, Charles B. Welsh, 1112 W. Water Street, South Bend, Washington, attorney for plaintiff, and Stella Hughes, plaintiff.

You and each of you will please take notice that the State of Washington, defendant above named, hereby appeals to the Supreme Court from each and every part of the judgment dated February 10, 1964, and entered herein on

[File endorsement omitted]

February 11, 1964, in favor of the plaintiff and against the defendant.

Dated this 18th day of February, 1964.

Temple of Justice, Olympia, Washington.

John J. O'Connell, Attorney General, By Harold T. Hartinger, Assistant Attorney General.

[fol. 16] [File endorsement omitted]

Receipt Sent.

Copy Received 3/13/64, Charles B. Welsh, Attorney for Plaintiff.

[fol. 17]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR PACIFIC COUNTY

No. 14546

STELLA HUGHES, Plaintiff,

vs.

STATE OF WASHINGTON, Defendant.

STATEMENT OF FACTS—Filed March 13, 1964

Before the Honorable Warner Poyhonen, Judge of the Superior Court, Grays Harbor County, sitting as Visiting Judge at South Bend, Pacific County, Washington, January 23, 1964.

APPEARANCES:

For plaintiff, Charles B. Welsh, Attorney at Law, South Bend, Washington.

For defendant, Harold T. Hartinger, Assistant Attorney General, Olympia, Washington.

As Amicus Curiae, Ted Zelaso and Robert Ingram, Attorneys at law, Aberdeen, Washington.

Whereupon the following proceedings were had and done, to-wit:

[fol. 19] Court: Hughes vs. State of Washington. I want to inquire of counsel if they are ready now or do they want me to defer it until 1:30. Whatever they wish. I will do it any way you like. I doubt if you can finish this morning but if you want to start in and plaintiff would like to make his record this morning.

Mr. Hartinger: We have a completely agreed statement of facts and I think we can easily put this in 20 minutes or so and perhaps come back after lunch and defer the argument until 1:30.

Court: That would be fine.

Mr. Hartinger: Mr. Zelasko and Mr. Ingram are appearing as Amicus Curiae.

Court: Mr. Welsh, are there any others that are appearing or desire to appear? Have you heard of any?

Mr. Welsh: Not to my knowledge. Do you want to proceed—I take it—

COLLOQUY

Mr. Hartinger: I guess I have the laboring oar all the way through. Just by way of preliminary statement. Mrs. Hughes, the plaintiff, owns property along the Pacific Ocean and she has set forth in her complaint a description of this property as it relates to the area above or landward and it is not in dispute. She claims, in addition, ownership of accreted lands, that is, the land in front of the property she described out to the mean high tide line on the Pacific Ocean. The State has disclaimed any interest in the property that the plaintiff claims lies above—what we will call—the fixed boundary of the 1889 boundary of

the tidelands. This case, as I explained to Your Honor the other day in another court, is one case which is being tried of several. I counted the similar cases and I think we have seven. Mr. Welsh can probably verify they have seven other cases that have the same problem that is [fol. 20] raised by the State's cross complaint here. In these seven cases we have stipulated as to this issue. The Court's determination here will determine the issue in those seven cases. There are three other cases—the one in Grays Harbor County and two more in this county which have the same issue. We don't have a formal stipulation. Then, of course, several other cases have the same problem. They are not filed yet, but still are on some counsel's desk one way or another. As to the State's—

Mr. Welsh: Excuse me counsel. I think we should further define the admitted facts. This is a representative case among many. Each of these cases, as well as the one at present—the original title was acquired by plaintiff or predecessors in interest prior to 1889 from the United States Government.

Court: Prior to statehood?

Mr. Welsh: Prior to statehood.

Court: As a patent from United States Government?

Mr. Welsh: Yes. So that our actual conflict is whether or not the 1889 mean high tide line governs in this case or the mean high tide at any time wherever it may be. We contend it is the latter and the State contends the former. A little bit of clarification here. There are really two problems in this case—one, the accretion problem. The other one is the rule for defining the boundary. Whether it is the 1889 boundary or whether it is the present day boundary. Technically, the boundary that the Federal Court used and the one plaintiffs use, is called the line of mean high tide. And when we use that term, we are talking about the technical definition. The State argues the line of vegetation which is a sort of mark on the ground. Those are the two issues actually involved in the

[fol. 21] thing. The Federal rule does not take cognizance of the vegetation line title-wise. As far as my reading has progressed, this is a theory used by the engineers of the State of Washington exclusively. It is used customarily by engineers—.

Court: Are you referring to the line of vegetation—

Mr. Welsh: Yes. In streams and rivers, but a vegetation line, title-wise, is a meaningless thing as I understand it from the Federal Rule.

Court: All right.

Mr. Hartinger: Well, again, we are trying this case obviously because we tried this issue in the Federal Court and where the Federal Government was owner of these ocean lands as a trustee for some Indians. In the Federal Court we were attacked on both grounds. The Federal people denied our claim to the land that is formed by accretion since statehood. They likewise argue that this mean high tide line, as used by the U. S. Coast and Geodetic Survey, was the boundary of the tideland. They insisted that the rule that the State has been using—the line of vegetation—is a rule that can be used only for rivers and lakes. Now, as to the factual basis behind the line of vegetation. The State in disposing of its tidelands has used the line of vegetation, but the facts are also that everybody else in the state has been using it. The Supreme Court has defined it as the boundary line. Our problem on this issue is the accretions. The Court of Appeals has decided the state law must be disregarded and that Federal law, as developed by the Federal Court, must be applied. Basically this is our issue.

Court: Are you ready to start putting in some evidence.

Mr. Hartinger: What I would like to do—I have talked [fol. 22] to counsel about it and he has no objections. We prepared the record by starting with requests for admission of facts. I would like to take these requests, have them marked as an exhibit and then introduce them in this fashion so that counsel and everybody else will have

some order to their files. It would save reading to the reporter quite a number of things.

Court: There are no objections to that?

Mr. Welsh: No objections to the procedure if it could be noted that plaintiffs prefer not to make a specific objection to each but simply object to the relevancy in toto.

Court: These will be defendant's exhibits?

DEFENDANT'S EXHIBITS 1-7 IDENTIFIED AND ADMITTED

Mr. Hartinger: Yes. What we have labeled Requests for Admission No. 1 is marked Defendant's Exhibit for Identification No. 1. Requests for Admissions of Facts No. 2 has been marked Defendant's Exhibit No. 2 for Identification. Request for Admissions of Facts No. 3 has been marked Defendant's Exhibit No. 3 for Identification. Request for Admission of Facts No. 4 has been marked as 4 for Identification. Defendant's 5 for Identification is Request for Admission of Facts No. 5. Now, we have one map, which is labeled "Typical Beach Section, Pacific Ocean Beach." Mr. Welsh has agreed that this could come in subject to the same objection to the other. This will be Defendant's 6.

Court: All right. These may be admitted one through six subject to the objection as to their relevancy.

Mr. Welsh: Yes.

Mr. Hartinger: I have one more item and that is the government publication entitled, "Tidal Datum Planes." And the Clerk has marked that Identification 7.

Court: It may be admitted.

Mr. Hartinger: Then we just have one more fact we [fol. 23] wish to orally stipulate to and that is the government survey of the upland adjoining this area was made in 1859.

Mr. Welsh: Agreed.

Court: You want to secure an oral stipulation by counsel that the government survey—

Mr. Hartinger: Of the area in question—

Court: Of the area in question was made in 1859.

Mr. Hartinger: Yes, Your Honor.

Court: That stipulation may show for the record.

Mr. Hartinger: All our exhibits are in.

Court: All that you have offered—there are seven of them.

Mr. Hartinger: That is the record. I would like to hand to Your Honor a trial memorandum. It is quite lengthy and then after the Court has had an opportunity to read it, I would like to explain what the case is about—what our contention is about. Why we make them and argue the matter.

Court: We may adjourn at this time and give me a little time to read this. Say two o'clock?

Mr. Hartinger: That will be fine.

Court: For oral argument.

Mr. Welsh: That is satisfactory.

Court: We will be at recess until two.

(Court recessed until 2:00 p.m. and reconvened with all parties present.)

Court: Court's in session.

(Counsel then proceeded to argue their case after which the Court made his oral decision as follows:)

COURT'S DECISION AND STIPULATION

Court: I think I would be regarded as rather naive if [fol. 24] I failed to appreciate that we are involved in a question in all probability is not going to end here with a decision of the Superior Court of Pacific County. Frankly we are in an area—I don't know as to the circumstances of the parties involved of this particular litigation; an area in which there should be some day at least a final adjudication as to the rights of the people so that we will know where we are for sure and what we own and we don't own; who owns what and who doesn't. With

that in view, I expect that about all I am probably doing today is deciding who has to take the initiative of an appeal. This may seem—I am aware of the importance of the problems involved here. This may seem somewhat of a hasty decision in such an important case. I could postpone it by taking the matter under advisement and to delay a month or two or by writing a memorandum opinion on it; I would take the matter under advisement and write a memorandum opinion if I felt there was any real purpose being served in doing so. I have had some experience with these problems. I never tried one as a lawyer. I represented private clients on two or three occasions with the State of Washington on the other side. The State backed up a little and agreed to sell on rather reasonable terms or give my client a 99-year lease for a dollar or some such thing that made the lawsuit unnecessary and I never did get to court on the two or three matters which I represented private clients in my lawyer days. As a State legislator in 1947 and 1949, I gave the problem considerable thought. In those days I was quite concerned by reason of the fact some of my constituents out in the Oyehut and Ocean Shores way were quite concerned in getting something accomplished. I gave the matter considerable study. I have had a number of conversations with representatives in the Land Department of the State. One of the Superior Court cases in the [fol. 25] exhibit is one of mine out of Grays Harbor County in '58. That is the Sunshine Mining Co. vs. Union Gas Development. I don't know if it is particular in point. I think all I had to do was decide where the line of vegetation had been on a certain date because under state law, title rested on the state permit and it was a factual question and neither party in that litigation was questioning the state's right or title or could they by reason of whatever rights they had, rested on those permits. I watched with considerable interest the Ocean Shores development. The lawsuit in Minard quiet title action involved several

miles of ocean front. That didn't come before me. It was settled. Of course, that Superior Court decision established ownership in the State of Washington. I have never felt it was truly an adversary proceedings. What Minard did—he brought a lawsuit. I think part of the proceedings there was an effort to shut out some squatters out there, who probably had good title by adverse possession if Minard was owner of the property and probably had no rights if the land belonged to the State during all of those years. I don't want to go into the merits except this comment, if Minard owned the property actually, probably it wasn't a bad deal for him. Litigation through the Supreme Court of the United States might have cost him a lot of money. If there wasn't any question about the state's ownership then, then it was state property beyond all question and the propriety of a sale of several miles of beach for $40,000 might be open to question. I will say I have given the matter some little study. I have thought about it from time to time during probably a third of my lifetime. Not continuously but have been aware of it. With that explanation, I hope that the decision won't be regarded as being a hasty one. It is a rather interesting circumstance to me that this being 1964, it is about 75 years since statehood and that our State Supreme Court [fol. 26] would not have been called upon specifically and directly to decide the questions involved here and particularly that question of moving line. It is not in the record—is pure speculation on my part—I have a feeling that what has happened many times and what actually did in two or three of my clients that the State was inclined to back away and so the problem has never been settled by our State Supreme Court. With the result that we have had 74 years of development of a body of State law based on departmental decisions, administrative determination, attorney general's opinions, opinions and decisions of Superior Courts for the most part and a few by our State Supreme Court to kind of get rather close

to the question involved here, but doesn't decide it squarely. We have had, as Mr. Hartinger said, a development of a body of State law or local rule—I guess we can call it a change or modification in common law. They all mean the same thing. We are met with the argument that now we ought not to change that because of the upsetting effect a different decision would have. I don't believe that there is any question that a state may develop its own body of law to change the common law. I think that could be conceded. I don't think anyone would argue very seriously to the contrary. Common law can and does change. The problem here is whether—the problem here is a question of jurisdiction. Whether the state law does apply or whether Federal law should be applied. I just don't see any escape from the decision in the Borax Consolidated vs. Los Angeles case in 296 U.S. 10. That is a 1935 case where 28 years ago the opinion was written by Chief Justice Charles Evans Hughes and the Ninth Circuit Court of Appeals decision in United States vs. the State of Washington in 1961, 26 years later, where the decision was written by Justice Hamley, who was formerly a member of the Supreme Court of the State of Washington, [fol. 27] that is, the 294 F.(2d) 830 case. I think those cases decide specifically the question that is involved here. The Borax case, now 28 years old, hasn't been departed from that I can find. And the Sampson Johns' case, the Ninth Circuit Court case in '61, was a Federal Case. He was a resident of the state. The State had a lawyer, who for many years felt that the Washington rule—the local law—should be applied. The Circuit Court reversed him and specifically held against the position of the State on both phases of the question. In the Borax case Justice Hughes said—this was quoted in the Sampson Johns' case —"Petitioners claim under a federal patent which, according to the plat, purported to convey land bordering on the Pacific Ocean. There is no question that the United States was free to convey the upland, and the patent

affords no ground for holding that it did not convey all the title that the United States had in the premises. The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law." A number of cases are cited in support of that doctrine. And in that case, of course, the Court in the opinion was the enunciation of the Federal rule—the boundary between tidelands and uplands is the mean high tide line. Such to be determined by the average of 18.6 years. That is the holding of the Supreme Court of the United States which the Circuit Court quoted in the Sampson Johns' case. They went on to follow the holding in the Borax case to the effect that the line is the line of mean high tide of the average elevation as observed at a location through a tidal cycle of 18.6 years. [fol. 28] I was personally disappointed that the Supreme Court of the United States denied the certiorari in the Sampson Johns Case. I was hoping they would take jurisdiction and I am aware that no particular inference ought to be drawn from the fact that they denied certiorari except possibly that if the Circuit Court of Appeals had departed from the rule announced in Borax and had held in favor of the State of Washington rather than in favor of the Federal Government, I just can't help but feel the Supreme Court of this nation would have wasted no time in granting the certiorari and taking another look at the problem. Now, whether these decisions are right, whether the court was right in the Borax Case and again in Sampson Johns Case, that's what it did and is something that I can't be concerned with. All I'm saying is it seems to me they did say it. I feel I am bound by it. I can't do very much more about it. There are people understandably who would not be happy with the rule. I think

the opinion of Judge Chambers in the Circuit Court case is worth reading. It is a short paragraph and may express the feelings of a great many of us. Judge Chambers said, "As a District Court thought, I think that the question of the line of title ought to be decided by state law, but as I read Borax Consolidated Ltd. vs. Los Angeles, 296 U. S. 10, I think the road sign points to the line being treated as a Federal question, so I concur." He is bowing to the inevitable. That is just the feeling I have. I know that nobody has ever worked harder on this case or cases involving this question than Mr. Hartinger. He has put a great part of his lifetime into it and it looks like he is going to spend some more. If he can persuade the Federal Court and the Supreme Court of the United States to take another look at it, more power to him. I am going to grant the plaintiff's judgment on both issues—as to the [fol. 29] title to the accretions and as to the line.

Mr. Hartinger: I don't propose to call Your Honor back. It is just as easy to go over to Montesano and I would like to stipulate that the judgment may be signed by Your Honor in Montesano.

Mr. Welsh: Certainly.

Court: I have that right anyway.

* * * * * * *

[fol. 30] JUDGE'S CERTIFICATE

State of Washington,
County of Pacific, ss.:

I, Warner Poyhonen, one of the Judges of the Superior Court of the State of Washington and the Judge before whom the above-entitled cause was tried, do hereby certify:

That the matters and proceedings embodied in the foregoing Statement of Facts are matters and proceedings occurring at the trial of said cause, and the same is hereby made a part of the record herein.

I do further certify that the same contains all the material facts, matters and proceedings heretofore appearing in said cause and not already a part of the record herein.

I do further certify that 7 exhibits, marked Defendant's Exhibits 1 through 7, hereto attached, are all the exhibits admitted in evidence upon the trial of said cause.

Done in Open Court this 8 day of April, 1964.

Warner Poyhonen, Judge.

[File endorsement omitted]

[fol. 31]

Pacific County

Judge Warner Poyhonen

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 37583

En Banc

STELLA HUGHES, Respondent,

v.

THE STATE OF WASHINGTON, Appellant.

OPINION—Filed January 20, 1966

WEAVER, J.—The questions of law generated by this appeal spring from Article 17 of the state constitution, its historical background, and its interpretation, legislative, administrative, and judicial.

Article XVII—TIDE LANDS

§1 DECLARATION OF STATE OWNERSHIP. The state of Washington *asserts its ownership* to the beds and shores of all navigable waters in the state *up to and including the line of ordinary high tide, in waters*

> *where the tide ebbs and flows,* and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: *Provided,* that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state.
>
> §2 DISCLAIMER OF CERTAIN LANDS. The state of Washington disclaims all title in and claim to all tide, swamp and overflowed lands, patented by the United States: *Provided,* the same is not impeached for fraud. (Italics ours.)

Plaintiff, Stella Hughes, is the owner of an upland tract of land on the Long Beach Peninsula near Ocean Park, Pacific County, Washington. Title is deraigned from a [fol. 32] patent issued prior to statehood. In this action to quiet title plaintiff alleges[1] that the west boundary of the tract is described as

> the line of *ordinary high tide* of the Pacific Ocean. (Italics ours.)

She prays that the court establish the westerly boundary of her property to be "the line of *mean high tide* of the Pacific Ocean." No time for the determination is indicated.

The trial court found that since the original survey and establishment of the meander line by the United States government in 1859, imperceptible accretions have formed in front of plaintiff's property, both before and after November 11, 1889, and that all the accretion belongs to plaintiff as upland owner. The state does not claim the accretion prior to 1889, the date of its admission to the

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[1] Plaintiff alleges ownership of the following described property:

Beginning at a point 1353 feet north from the line between Sections 4 and 9, Township 11 N. R. 11 West W. M. and 437.3 feet west from the west line of State Highway No. 12-A, thence north 226.6 feet, thence west 300 feet more or less to the line of *ordinary high tide* of the Pacific Ocean, thence South 226.6 feet, thence East 300 feet more or less to beginning. (Italics ours.)

union. It contends, however, that the present western boundary of plaintiff's land and the present eastern boundary of the state's tidelands is the line of "ordinary high tide" as it existed November 11, 1889. In its answer and cross-complaint, the state alleges that this line on November 11, 1889 was described as follows:

> [fol. 33] Beginning at a point whose Y coordinate is 436,139.17 and whose X coordinate is 1,104,683.64, referred to the Washington Coordinate System, South Zone, and running thence on an azimuth of 11°14'05" 3412.79 feet to a point whose Y coordinate is 432.727.18 and whose X coordinate is 1,104,610.10, referred to said coordinate system.

The state appeals from a judgment dated February 10, 1964, which determines:

> that the western boundary of the foregoing property [of plaintiff] is the line of *mean high tide* of the Pacific Ocean *as it now or hereafter may exist*, which line is the average elevation of all high tides as observed at a location in front of the property through a complete tidal cycle of 18.6 years. (Italics ours.)

We point to the possible difference between "ordinary high tide," as set forth in the constitution, and "mean high tide as it now (February 10, 1964) or hereafter may exist," as determined by the trial court. We also point out that the superior court determined a possible changing or shifting western boundary for plaintiff's property.

This appeal brings into sharp focus the following questions: (a) When did title to the tidelands vest in the State of Washington? (b) What is the *nature* of the State's ownership? (c) What is the *extent* of the State's ownership? i.e. what is the dividing line between the upland property and the state-owned tideland? (We are not concerned with the seaward line in the instant case. See the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315 (1958 ed.)). (d) Is the dividing line a fixed line or is it a chang-

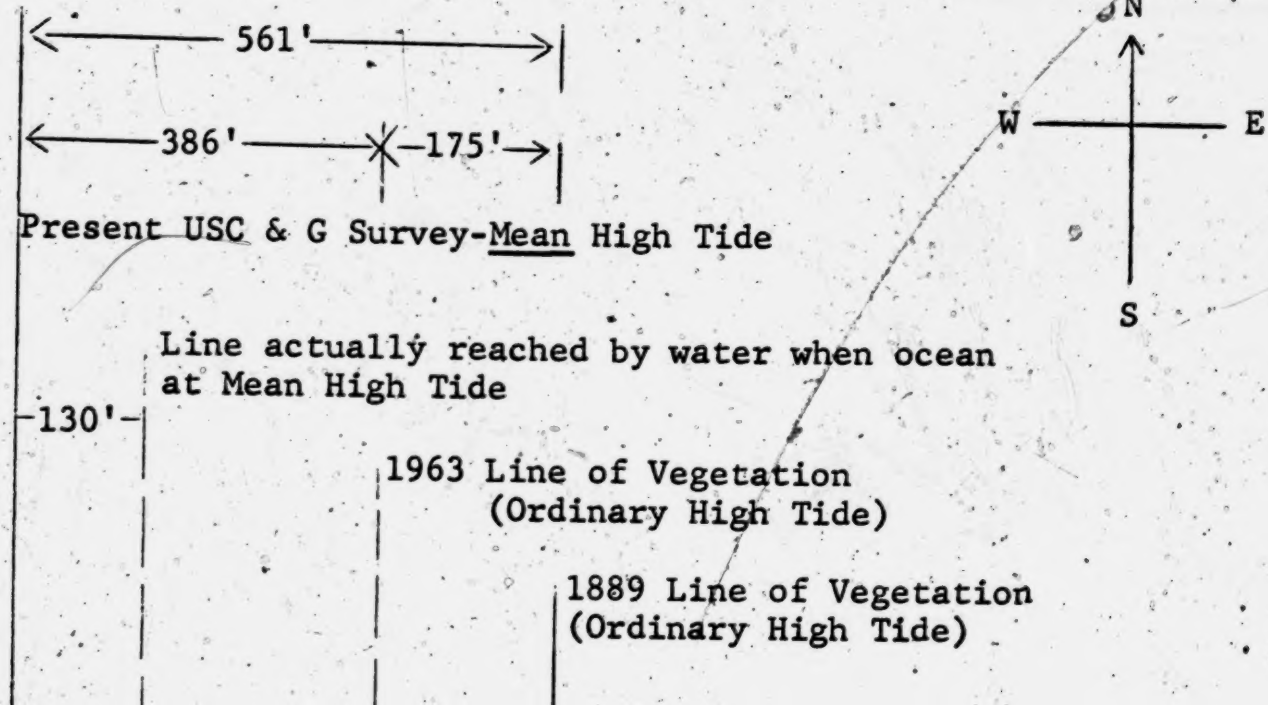
[fol. 34] ing line depending upon accretion or reliction? (e) If a fixed line, as of what date should it be established? The trial court said in its oral opinion:

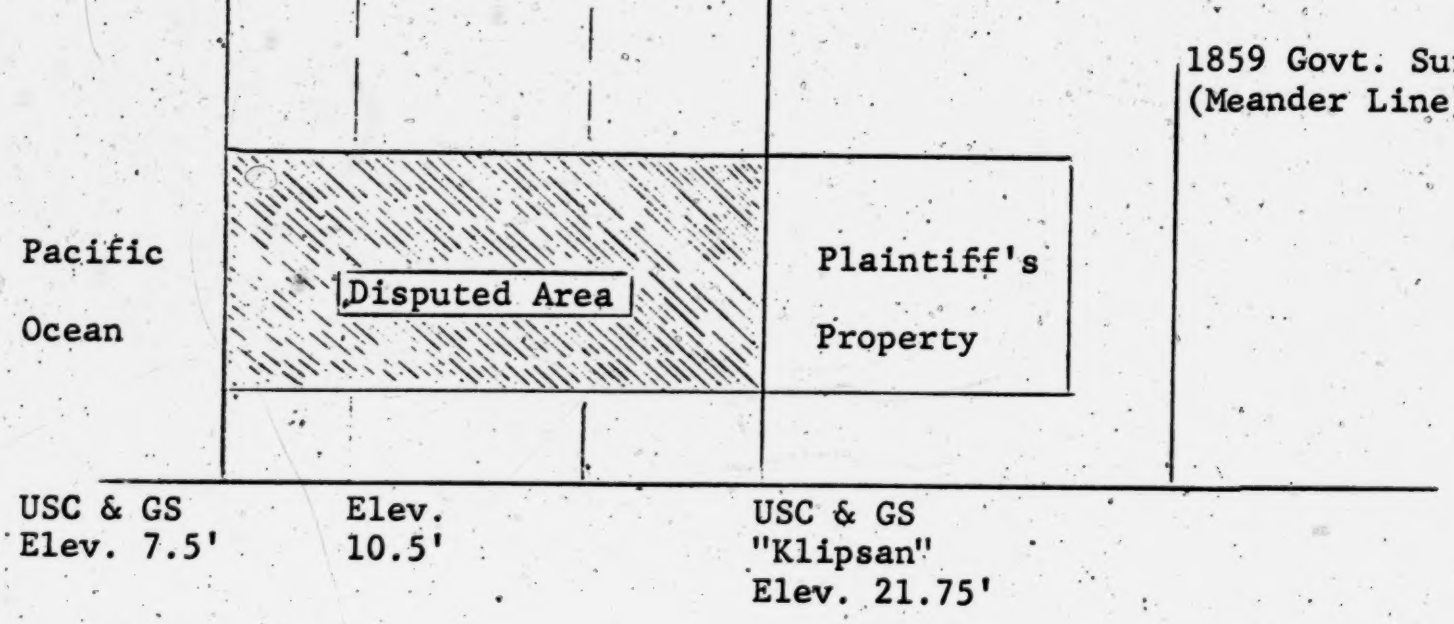
> It is a rather interesting circumstance to me that this being 1964, it is about 75 years since statehood and that our State Supreme Court would not have been called upon specifically and directly to decide the questions involved here and particularly that question of moving line."

Undoubtedly there are other questions that might arise, be we deem the foregoing sufficient to present the issues of the instant case.

For the sake of clarity and in order to illustrate the facts we set forth the following sketch, prepared by the court from exhibits in the record. It is not drawn to scale.

(See opposite) ☞


561'
386'
175'
Present USC & G Survey-Mean High Tide
N
W
E
S
Line actually reached by water when ocean at Mean High Tide
130'
1963 Line of Vegetation (Ordinary High Tide)
1889 Line of Vegetation (Ordinary High Tide)


1859 Govt. Survey
(Meander Line)
Pacific
Ocean
Disputed Area
Plaintiff's
Property
USC & GS
Elev. 7.5'
Elev.
10.5'
USC & GS
"Klipsan"
Elev. 21.75'

[fol. 36]

History of Constitutional Provision

The questions presented by the instant case are not new. As early as 1854 the territorial legislature granted owners of property abutting navigable waters the right to build wharves, under certain conditions, and to "extend them so far into said waters or water courses as the convenience of shipping may require," and to maintain them for not more than 20 years.[4]

On numerous occasions the territorial legislature memorialized Congress to grant tidelands to the territory so that they might be sold and the funds used for internal improvements,[5] or to grant them to certain towns and cities to aid in their development.[6] In 1873 the territorial legislature passed an act confirming the title of the Seattle and Walla Walla Railroad and Transportation Company to the tidelands south of King Street in Seattle and around Elliott Bay "from extreme high to extreme low tide, and to deep water . . . derived by deed from the city of Seattle to the said company dated August 19, 1873," provided the first section of 15 miles of railroad be constructed within three years. The territory purported to convey such title "as would otherwise belong to and vest in the state, upon the admission of Washington Territory into the Federal Union as a state."[7]

[fol. 37] One cannot read the record of the proceedings of the state constitutional convention[8] and the newspaper and editorial comment published during the convention

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[4] Laws of Washington Territory 1854, p. 357.

[5] Laws of Washington Territory 1869, p. 527.

[6] Laws of Washington Territory 1859, p. 500 (Olympia).
Laws of Washington Territory 1871, p. 220 (Olympia).
Laws of Washington Territory 1871, p. 213 (Seattle).

[7] Laws of Washington Territory 1873, p. 577.

[8] The Journal of the Washington State Constitutional Convention, 1889, p. 809 *et seq.* (Book Publishing Co. 1962).

(*Yelle* v. *Bishop*, 55 Wn.2d 286, 292, 347 P.2d 1081 (1959)), between July 4 and August 22, 1889, without concluding, as do the historians of that period,[9] that the most vexing and politically sensitive problem confronting the convention was that of harbors, and the control, use, ownership, and disposal of the tidelands of the new state to be. No other problem was of more vital concern to the economic development of the state, for the tidelands in front of Seattle and other cities on Puget Sound and the ocean were of tremendous value.

During the convention suggested constitutional proposals ranged from a declaration of inalienable state ownership of tidelands with limited leasing privileges, to no declaration at all, thus leaving all questions of tideland ownership and use to the whim of future legislatures. The major source of difference arose from whether the state, the cities, or private individuals and corporations should control the water front. Generally, five groups brought pressure to bear upon the 75 members of the convention: (1) the owners of upland property; (2) the occupiers or preemptors [fol. 38] of tidelands who had placed improvements thereon; (3) land speculators; (4) cities and towns; and (5) the railroads. The conflict of interests was sharp and the debates reported were acrimonious.

It was not until August 22, 1889, the final day of the convention, that Article 17 (quoted *supra*) was adopted.[10] The article is, in truth, a Janus-like compromise of the contentions of the various schools of thought in the constitutional convention. Although it asserts state ownership of tidelands and disclaims all right to tidelands theretofore patented by the United States, it makes no declara-

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[9] See Nesbit, "He Built Seattle" p. 308 *et seq.* (University of Washington Press, 1961). This is a biography of Thomas Burke, Chief Justice of the Territorial Supreme Court, 1888-1889.

[10] Austin Mires (a member of the constitutional convention), "Remarks on the Constitution of the State of Washington," The Washington Historical Quarterly, Vol. 22, No. 4, Oct. 1931, p. 276.

tion of policy to govern the use or disposition of such lands. The convention left the use and sale of state-owned tidelands to the politics of future legislatures and to the interpretation to be given Article 17 by the Supreme Court.

Before discussing our decisional law, it is necessary to review briefly the tideland statutes subsequent to statehood, the definition of "the line of ordinary high tide," and the administrative and superior court interpretations of the statutes.

Tideland Statutes Subsequent to Statehood in 1889

Since Article 17 was a compromise of the various interests represented in the constitutional convention, it is not surprising to find tideland politics carried forward into [fol. 38a] subsequent legislative sessions.

The early statutes provide for the survey, classification, and appraisal of state-owned tidelands[11] and set forth the method and manner of sale or lease thereof. Oyster beds were "withdrawn and reserved from sale or lease for the purpose of establishing a natural oyster bed reserve."[12] A railroad was granted the right to maintain tracks and wharves on tidelands.[13] Although abutting property owners were given a preferential right to purchase tidelands, one having placed improvements thereon prior to March 26, 1890 had the exclusive right to purchase if used for "commerce, trade, residence, or business."[14] Laws of 1899, ch. 83, § 1, p. 132[15] was the first legislative recognition of accretion to tidelands. The statute provided:

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[11] Laws of 1889-90, p. 431 731; Laws of 1891, p. 403; Laws of 1893, ch. 17, p. 26; ch. 49, p. 241.

[12] Laws of 1891, p. 366.

[13] Laws of 1897, ch. 88, p. 228.

[14] Laws of 1897, ch. 89, § 45, p. 250.

[15] Laws of 1899, ch. 83, § 1, amending Laws of 1897, ch. 89, § 51; reenacted by Laws of 1927, ch. 255, § 123; now codified as RCW 79.01.492. The reenactment made a few minor changes in the 1899 wording. See *Ghione* v. *State*, 26 Wn.2d 635, 650, 175 P.2d 955 (1946) for the changes.

> That any accretion that may be added to any tract or tracts of tide or shore lands *heretofore sold or that may hereafter be sold by the state shall belong to the state.* (Italics ours.)

The statute treats with accretion to *tidelands* "heretofore [fol. 39] sold or that may hereafter be sold" by the state. The accretion belongs to the state. The statute does not purport to determine ownership of accretion when the tidelands have not been sold. See *Strand* v. *State,* 16 Wn.2d 107, 129, 132 P.2d 1011 (1943). We do not construe the statute in any sense to be a waiver by the state of its interest in tidelands. It is more logical to conclude that this is a legislative recognition of the state's claim to all accretion after 1889 whether the tidelands be sold or not. The statute is at least indicative of the legislative intent to claim accretion for the state under the limited circumstances identified.

It was not until Laws of 1901, chapter 105, p. 217, and chapter 110, p. 225, that the *public's* interest in tide and shore land received legislative recognition. Chapter 110, § 1 provides:

> That the shore and beach of the Pacific Ocean, including the area or space lying, abutting or fronting on said ocean *and between ordinary high tide and extreme low tide (as such shore and beach now are or hereafter may be)* from the Columbia river or Cape Disappointment on the south to a point three hundred feet southerly from the south line of the government jetty on Peterson's Point, State of Washington on the north, be and the same *are hereby declared a public highway forever,* and as such highway shall remain forever open to the use of the public. RCW 79.16.170. (Italics ours.)
>
> No part of said shore or beach shall ever be sold, conveyed, leased or otherwise disposed of. RCW 79.16.171.

The statute declares certain shore and tidelands a "public highway forever."[16] It does not purport to reserve *all* [fol. 40] state-owned tideland in the vicinity as a public highway. We point out that the public highway is not described as abutting upland property; it is defined as "abutting or fronting on said ocean." Its seaward boundary is "extreme low tide"; its inland boundary is the line of "ordinary high tide . . . as such shore and beach now are [1901] or hereafter may be." Assuming that there had been accretion between 1889 and 1901, it does not follow that this statute disclaims state ownership therein. State-owned land may still remain between the inland boundary of the "public highway" (ordinary high tide as such shore and beach now are) and the 1889 line of ordinary high tide. It might, of course, be subject to sale to the abutting upland owner or others as the statutes provide. True, the boundaries of the reserved public highway may shift seaward because of accretion (a question we do not decide), but such move would in nowise affect the inland boundary of state-owned lands. It would simply preserve the prime portion of the beach for the public.

Our interpretation of Laws of 1901 (RCW 79.16.170 [fol. 41] quoted *supra*) is fortified by Laws of 1929, chapter 78, which provides:

> The commissioner of public lands is hereby authorized to offer for sale and sell in the manner herein-

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[16] The highway created is not a road intended for automobile traffic. It is a recreational area. As Judge Fullerton explained in *Williams Fishing Co.* v. *Savidge*, 152 Wash. 165, 181, 277 Pac. 459, 464 (1929):

> " . . . Prior to the year 1901, when the legislature declared the tide lands to be a public highway, the beach had become a favored resort for the people of the state who were seeking rest and recreation, and, as I gather from the surroundings and the current history of the times, the purpose of the legislature was, not so much to establish a thoroughfare, as it was to preserve the beach as a recreational ground for the use of the public. . . . "

after provided, all, or any portion of, the following described lands:

[described]

lying above and on the land side of the inner boundary of the highway reservations made by chapter CV [105] and chapter CX [110], Laws of 1901, same being a line of ordinary high tide as the same is now located or as it may hereafter exist. (Italics ours.)

Thus, the legislature recognized an "inner boundary of the highway reservation" and authorized the sale of lands lying inland of this inner boundary of the highway reservation.[17]

A fundamental error of the trial court in the instant case is the application of the 1901 and 1929 statutory language to "a line of ordinary high tide *as the same now is or as it may hereafter exist*" (italics ours) to a factual situation to which it has no application.

The Nature of Tides

Tides are the result of gravitational attraction of the moon and sun upon the waters of the earth. Their heights vary with the changing positions of the moon, sun and earth in relation to each other. Changes in winds, barometric pressures, and the freshets or droughts of rivers, [fol. 42] together with the geography of the locale, will cause tides to be higher or lower than predicted by the United States Coast and Geodetic Survey. There are usually two high and two low waters or tides a day. They

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[17] Laws of 1963, chapter 212, p. 1058 provides that that portion of the public highway established by Laws of 1901, chapters 105 and 110 "lying between the line of vegetation and the line of mean high tide, as such lines now are or may hereafter be, is hereby declared *a public recreation area* and is hereby set aside and forever reserved for the use of the public." (Italics ours.) We believe this is the first legislative use of the terms "line of vegetation" and "mean high tide" as distinguished from "ordinary high tide."

may be designated, lower low water, low water, high water and higher high water. The datum (plane of reference) from which the heights of tides are calculated on the Pacific Coast (with the exception of Balboa, Panama) is the mean or average of the lower of the two low waters of each day.[18]

In Marmer, *Tidal Datum Planes*, p. 86 (U.S. Dept. of Commerce, Coast and Geodetic Survey, Special Pub. No. 135, rev. ed. 1951), it is stated:

> In view of the variations to which the height of high water is subject, mean high water [tide] at any place may be defined simply as the average height of the high waters at that place over a period of 19 years.

In its findings of fact, the trial court stated:

> mean high tide of the Pacific Ocean is defined as the average elevation of all high tides as observed at a location through a complete tidal cycle of 18.6 years, and the actual western boundary line of plaintiff's property is where that elevation meets the shore *as it exists at any particular time.* (Italics ours.)

[fol. 43] Since the line of "mean high tide" is an average over a period of years of the two daily high tides, one being higher than the other, it is apparent that the higher high tide will wash inland from the line of "mean high tide." This is illustrated by an exhibit showing the observed high tide on January 23, 1963 at a point a few feet south of plaintiff's property to have been 130 feet inland from the line of predicted "mean high tide." The difference in elevation was 3 feet. In the instant case, in front of plaintiff's property the distance between the line of "*ordinary*

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[18] Bowditch, American Practical Navigator, p. 252, U.S. Navy Dept. Hydrographic Office, No. 9 (1943); 1965 Tide Tables, p. 7, U.S. Dept. of Commerce, Coast and Geodetic Survey; *See United States* v. *California*, —— U.S. ——, 14 L.ED. 2d 296, 85 Sup. Ct. 1401 (May 17, 1965), in which the court equated the "line of ordinary low water" with "mean lower low water." Shalowitz, 2 Shore and Sea Boundaries 255 (U.S. Dept. of Commerce 1964).

high tide" in 1889, as defined by the state, and "*mean* high tide," as *presently* determined by the United States Coast and Geodetic Survey and adopted by the trial court, is 561 feet; the difference in elevation is 14.25 feet.

The problem presented is pinpointed by one author as follows:

> Boundaries determined by the course of the tides involve two engineering aspects: a vertical one, predicated on the height reached by the tide during its vertical rise and fall, and constituting a tidal plane or datum, such as mean high water, mean low water, etc.; and a horizontal one, related to the line where the tidal plane intersects the shore to form the tidal boundary desired, for example, mean high-water mark, mean low-water mark. . . . The first is derived from tidal observations alone, and, once derived (on the basis of long-term observations), *is for all practical purposes a permanent one.* Shalowitz, 1 Shore and Sea Boundaries 89 (United States Department of Commerce 1962). (Italics ours.)

"Mean high tide" is measurable and determinable.

On the other hand, "the line of ordinary high tide" as used in Article 17 of the constitution is not a term of techni- [fol. 44] cal exactness. It is indefinite at best and an oversimplification of a phenomenon inherently complex and variable. In the absence of any indication to the contrary, we deem the word "ordinary" to be used in its everyday context. The "line of ordinary high tide" is not to be fixed by singular, uncommon, or exceptionally high tides, but by the regular, normal, customary, average, and usual high tides. One cannot sit and watch the tide reach its stand at different elevations on each turn as it ebbs and floods without realizing that a line to be fixed by it must be based upon an average. Thus the line of "ordinary high tide" is the average of all high tides during the tidal cycle.

Administrative and Superior Court Interpretations

The record before us supports the conclusion that the commissioner of public lands has established the common boundary between upland property and state-owned land to be the line of ordinary high tide where it existed November 11, 1889. Over the years, 73 lawsuits affecting 322 private ownerships have been instituted against the state to establish this boundary. The judgments of the superior court are before us as exhibits in the instant case. None was appealed. The state accurately described these judgments when it said in its opening brief:

> In every one of these cases the court has divided the accreted lands on the same formula: those accreted lands formed prior to statehood are the property of the private upland owner; those accreted lands formed since statehood are public beach and shore.

[fol. 45] The language of these judgments varies in minor respects. In some the 1889 line of ordinary high tide is related to a surveyed corner and described by metes and bounds; in others it is described as being a stated number of feet above the "line of mean lower low water," thus a standard set by the United States Coast and Geodetic Survey is recognized; in still others, the 1889 line is described with particularity by reference to the Washington Coordinate System, South Zone, as claimed by the state in the instant case. In practically all of the judgments the 1889 line as surveyed and described therein is judicially determined to be the line of "ordinary high tide where it existed on the 11th day of November, 1889, established by the commissioner of public lands." Thus over the years the only state constitutional court of general jurisdiction established a rule of property which has been relied upon and applied on many occasions when the state has sold tidelands pursuant to statutory authority.

Following the decision of this court in *Harkins* v. *Del Pozzi*, 50 Wn.2d 237, 310 P.2d 532 (1957), the superior court judgments entered thereafter further described the 1889 line as the "line which the water impressed on the soil by

covering it for sufficient periods to deprive the soil of vegetation." This added nothing to the line which had already been surveyed and established. In *Shelton Logging* [fol. 46] *Co.* v. *Gosser,* 26 Wash. 126, 66 Pac. 151 (1901), this court had already considered the line of vegetation and the line of mean high tide to be the same. Further, in *Harkins, supra;* there was an unchallenged finding of fact equating "the line of ordinary high water" with the "line of mean high tide." No further description was necessary.

Court Decisions

Two years after its adoption, the landmark case of *Eisenbach* v. *Hatfield,* 2 Wash. 236, 26 Pac. 539 (1891), brought Article 17 of the constitution to the Supreme Court for construction and interpretation. The five-man court[19] was unusually well qualified to consider it.[20]

Plaintiff, the owner of upland property abutting the high-water mark of Puget Sound, claiming he was entitled to certain littoral rights, sought to enjoin defendants from maintaining and using certain improvements upon tidelands in front of the property. The improvements had been erected prior to March 26, 1890, were in actual use for commerce, trade and business, and subject to purchase by defendants under Laws of 1889-90, § 11, p. 435. (See *supra.*) [fol. 47] At the outset, we emphasize, as does the *Eisenbach* opinion, that "riparian rights in the several states are settled by the respective states for themselves." The decision was made when the constitution was adopted in 1889 and confirmed by the admission of the state into the federal union upon an equal basis with other states.

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[19] See Chronological History of the Supreme Court of the State of Washington, 61 Wn.2d 792 (1963).

[20] Judge John P. Hoyt had been president of the constitutional convention; Judge Ralph O. Dunbar had been chairman of the committee to draft the constitutional provisions for state, school, and granted lands, which encompassed tidelands; and Judge T. L. Stiles, who write the dissent, actively opposed constitutional regulation of tidelands on the ground the doctrine was against sound public policy.

> The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows .... Art. 17, § 1, State Const.

The constitutional assertion of state ownership is clear and unambiguous. As Judge Anders said in his well-considered opinion, "it is scarcely necessary to look beyond our own constitution and laws for authority to guide us to a conclusion."

In the *Eisenbach* case, plaintiff contended that whatever may be the title of the state to the soil under tide water, he, by virtue of his contiguity to the water, had certain rights in the shore peculiar to himself. He claimed a vested property right (a) to wharf out opposite his upland and have unobstructed access to the navigable water in front of his property and (b) to acquire by accretion land that might thereafter be formed.

After a meticulous analysis of the authorities, this court said:

> The foregoing decisions of the highest judicial tribunal of the United States, without other or further [fol. 48] authority, would seem to settle, beyond controversy, the question of title to the tide lands of this state, and to leave no doubt whatever that they belong to the state in *actual propriety,* and that the state has full power to dispose of the same, subject to no restrictions save those imposed upon the legislature by the constitution of the state and the constitution of the United States; and, if this be true, it necessarily follows that no individual *can have any legal right* whatever to claim any easement in, or to impose any servitude upon, the tide waters within the limits of the state, without the consent of the legislature. (Italics ours.)

The court concluded:

> We think the authorities abundantly show that a riparian proprietor on the shore of the sea, or its arms, has no rights as against the state or its grantees to extend wharves in front of his land below high water mark.

The court did not completely resolve plaintiff's second contention in the *Eisenbach* case—his claimed vested right to future accretion. The court said:

> we are unable to see how one can have a *present* vested right to that which does not exist, and which may never have an existence. (Italics ours.)

The court did, however, point out that the authorities to the contrary were "based either upon statutes or local customs, and are therefore not precedents binding upon us." That which did not exist when *Eisenbach* was decided—accretion seaward of upland property—now exists. We conclude that its ownership is resolved by the *rationale* of *Eisenbach* and that accretion formed since November 11, 1889 is an addition to state-owned property, not to upland property. As the court said:

> [fol. 49] The result of our investigation of the authorities leads us to the conclusion that riparian proprietors on the shore of the navigable waters of the state have no special or peculiar rights therein as an incident to their estate. To hold otherwise would be to deny the power of the state to deal with its own property as it may deem best for the public good.

Our conclusion is not startling. It is simply a reaffirmance of a rule of property established by many prior superior court decisions heretofore discussed, and of the rule relied upon over the years in a myriad of land transactions between individuals and between the state and individuals.

At the next session of the Supreme Court the questions discussed in *Eisenbach* were again submitted to and re-examined by the court in *Harbor Line Commissioners* v. *State,* 2 Wash. 530, 27 Pac. 550 (1891). The court said:

> The court is still of the opinion that, as against the state, a littoral owner, simply as such owner, can assert no valuable rights below the line of ordinary high tide.
>
> The somewhat careful examination which I have given this case has confirmed my opinion that at common law the sovereign power (resting in England in parliament) could take such lands without compensation, and absolutely exclude the littoral proprietors from any rights thereto.

The state's constitutional assertion of ownership in 1889 terminated any rights the upland owner may have had to future accretion. Thereafter, the possible rights of an upland owner are those that might be established by the legislature.

This conclusion is fortified by the court's opinion in [fol. 50] *Washougal, etc. Transp. Co.* v. *Dalles, Etc. Nav. Co.,* 27 Wash. 490, 68 Pac. 74 (1902), wherein the state's grantee of shorelands sought to claim shorelands created in part by erosion (the opposite of accretion) and by debris caught and held by pilings. The court held:

> It cannot be that shore lands created by the erosion of the banks of a stream within the boundaries of a private claim inure to the benefit of the state; nor can the state claim, as shore lands, fills in a river caused by artificial means.

In the instant case plaintiff's (respondent's) argument in support of the judgment of the trial court orbits around three decisions: *Borax Consolidated, Ltd.* v. *Los Angeles,* 296 U.S. 10, 80 L.Ed. 9, 56 Sup. Ct. 23 (1935), *Ghione* v. *State,* 26 Wn.2d 635, 175 P.2d 955 (1946), and *U.S.* v. *State*

of Washington, 294 F.2d 830 (1961). It was apparently the third decision which triggered this action.

We do not find the three cases apposite. *Borax, supra,* establishes the rule that mean high tide (the average height of all high waters through a complete tidal cycle) is the criterion for "ordinary high water." [21] The case does not involve the question of accretion.

[fol. 51] Some of the language in *Ghione, supra,* read without reference to the particular facts before the court, seems to lend weight to respondent's argument in support of the judgment. This case, however, involves the ownership of the bed of two rivers, first surveyed in 1865. River courses had changed gradually over the years; one was changed artificially in 1913. Finally one river ceased to flow when the level of the water of Lake Washington was lowered in 1915. The case does not involve tidelands. We have no quarrel with the decision as applied to the facts; we do not, however, deem it controlling of the instant case.

In *United States* v. *State of Washington,* 294 F.2d 830 (1961), certain lots in Grays Harbor abutting on the Pacific Ocean belonged to the federal government subject to a trust patent issued in 1916 to Samson Johns, a Quinault Indian. The lots were at all times part of the public domain until patented. The court applied federal law and determined that accretion belonged to the uplands owned by it subject to the trust patent. We do not question the federal government's right over its own property, but the rules applied by the United States Court of Appeals do not override the established rules of property of the sovereign state in a controversy between it and one of its citizens.

In conclusion, we hold that the state acquired ownership of tidelands in actual propriety November 11, 1889. The [fol. 52] property line is the line of ordinary high tide,

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[21] We are aware of the footnote reference in *Narrows Realty Co.* v. *State,* 52 Wn.2d 843, 329 P.2d 836 (1958), equating "the line of ordinary high tide" with "neap tides," but the reference is not necessary to the decision and is, therefore, dictum.

which we equate to mean high tide on that date. Littoral rights of upland owners were terminated. Upland owners have only those rights subsequently recognized by legislative enactment. All accretion subsequent to November 11, 1889 is owned by the state and may be sold or reserved as a public highway or public recreation area as the legislature shall determine.

The judgment is reversed and the cause remanded for entry of judgment not inconsistent with the views herein expressed.

It is so ordered.

Weaver, J.

We concur: Rosellini, C. J., Donworth, J., Finley, J., Ott, J., Hamilton, J., Hale, J.

[fol. 53] No. 37583

Hill, J. (dissenting)—I find myself lost in admiration at the scholarship and erudition manifested in the majority opinion. However, all the legal signposts that I can read *and understand* point in the opposite direction, so I am compelled to dissent.

We must decide whether the westerly (seaward) boundary of Stella Hughes' property is the present mean high tide line, or whether it is the line of ordinary high tide as the state of Washington computes it to have been on November 11, 1889. It is really as simple as that.

Signpost 1: Location of plaintiff's westerly (seaward) boundary is a federal question.

The plaintiff traces her title to a federal patent issued before Washington became a state. This court recognized a long time ago the right of federal courts to ascertain the limit of federal grants. See *Washougal and LaCamas Transportation Co.* v. *Dalles, Portland and Astoria Navigation Co.*, 27 Wash. 490, 496, 68 Pac. 74 (1902). In *Borax*

Consolidated, Ltd. v. *Los Angeles,* 296 U. S. 10, 80 L.Ed. 9, 56 S.Ct. 23 (1935), it was stated that when a federal patent is involved, the boundary between upland and tide-[fol. 54] land is necessarily a federal question. True, no accretions were involved, but it seems unlikely that this would have made any difference as to whether federal law should be applied.

Signpost 2: Federal law being applicable, the "shifting boundary theory" applies.

If federal law is applicable, then *United States* v. *State of Washington,*[1] 294 F.2d 830 (C.A. 9th 1961), cert. den. 369 U.S. 817 (1962), is decisive. That case holds that imperceptible accretions go with the uplands whenever title to the uplands is derived from the United States. The western or seaward boundary to the property involved[2] in that case was, as here, the line between uplands and tidelands. The present line of "mean high tide," which was defined as the average elevation of all high tides at a [fol. 55] given location through a complete tidal cycle of 18.6 years, was held to be that boundary. This definition was formulated by the United States Coast and Geodetic Survey and is part of what has been called the "shifting boundary theory." 2 Shalowitz, Shore and Sea Boundaries, 503 note 34.

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[1] It is interesting to note that in the cited case the state of Washington made all of the arguments it makes here for its fixed boundary of November 11, 1889, but found the Circuit Court of Appeals a forum less friendly to its idea of rewriting the law relative to accretions.

[2] The property involved: "Lots 3 and 4 of section 15 in township 18 north of range 12 west of the Willamette Meridian, adjacent to the Pacific Ocean in Grays Harbor County, Washington," belonged to the United States, subject to a trust patent issued in 1916 to Samson Johns, a Quinault Indian who died in 1930. In 1858, these lands were surveyed by the General Land Office, which established a meander line along and adjacent to the Pacific Ocean. The accretions which pushed the high-water mark seaward were held to belong to the United States subject to the heirs of Samson Johns, and not to the state of Washington.

This is the western or seaward line fixed by the trial court in this case, and it should be affirmed.

If this seems a ridiculously short and simple solution of the apparently complex problem with which the majority opinion deals, I can only say that it is the result dictated by common law,[3] and (as we have seen) by the federal law. It is a plain and well-traveled legal path. To arrive at the result the state desires (and the majority approves), a new, circuitous and rather devious route, rarely explored, must be followed. This is conceded in the state's brief when it says:

> It is a rare occurrence, of course, when a state denies a riparian owner title to tidelands[4] that have become fast lands by slow and imperceptible accretion, but at least two other states have done so. . . .

I would extend my discussion to point out four interesting circumstances that have been lost sight of, or at least [fol. 56] have been obscured, to date:

1. We have not previously defined the exact meaning of the phrase "line of ordinary high tide," as used in Art. 17, § 1 of our state constitution.

The case of *Harkins* v. *Del Pozzi,* 50 Wn.2d 237, 240, 310 P.2d 532 (1957) states:

> The line of ordinary high tide is that line which the water impresses on the soil by covering it for sufficient periods to deprive the soil of vegetation and destroy its value for agricultural purposes. . . .

However, the authority cited for this proposition is an Idaho case which was actually concerned with the ordinary

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[3] ". . . At common law the person whose land is bounded by sea, lake or river owns any additions thereto resulting from imperceptible accretion." *United States* v. *State of Washington, supra* (p. 834); *Shively* v. *Bowlby,* 152 U. S. 1, at page 35, 38 L.Ed. 331, 14 S.Ct. 548 (1894).

[4] I would interpolate "former" before "tidelands."

high water mark on Lake Pend Creille. The Circuit Court of Appeals rejected such a definition in *United States* v. *State of Washington, supra,* saying:

> In the case of tidal waters such as are involved here, the high-water mark means the line of high water as determined by the course of the tides, not as determined by physical markings made upon the ground by the water. The latter method of making this determination, which was followed by the district court, is appropriate only in the case of streams and other non-tidal waters which have no absolute ascertainable level because of variations of flow from a multitude of causes. (p. 834)

There is also dictum in *Narrows Realty Co. Inc.* v. *State of Washington,* 52 Wn.2d 843, 844, 329 P.2d 836 (1958), which defines the phrase as:

> " . . . line of 'ordinary high tide,' that is, the usual or ordinary high-water mark, the limit reached by the 'neap tides,' those tides which happen between the full [fol. 57] and change of the moon twice in every 24 hours . . . " 30 Words & Phrases (Perm. ed.) 253.

Neither of these cases involved imperceptible accretions or were concerned with the problem of possible shifting boundaries.

The question of whether the "line of ordinary high tide" is a shifting line is squarely presented here, and I believe the definition of this constitutional phrase should (and perhaps must) be identical with the definition of "mean high tide" heretofore quoted and adopted by the federal courts.

2. The state's ownership of

> the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows . . . [Const. art. 17, § 1]

is not questioned. Any rights of riparian or littoral owners in such "beds and shores" have properly been held to present a question of local law. Such a case was *Eisenbach* v. *Hatfield*, 2 Wash. 236, 26 Pac. 539 (1891), on which the state and the majority place great reliance. The case dealt solely with the relative rights of the state and the upland owner in the tidelands, the court holding that the upland owner had no right to extend a wharf beyond the high-water mark. The court specifically declined to decide whether plaintiff would be entitled to future accretions to his land.

No question, as to the complete control of the state over [fol. 58] "beds and shores" of all navigable waters is raised. Hence, the *Eisenbach* case has, it seems to me, no application.

The state had, on November 11, 1889, and the state has today and has had at all intervening times, title to the beds and shores of all navigable waters of the state lying seaward of the line of ordinary high tide (properly equated to mean "the line of mean high tide," as defined herein). The state loses no tidelands by the shifting boundary, because the accreted land has become "fast land," and it always has had title to the shore and beach between ordinary high tide (mean high tide) and extreme low tide. But, by the fixed-boundary rule, which Washington and "at least two other states" have invented, the upland owner loses the "fast land," which has been added to his upland by slow and imperceptible accretion, and his contact with the line of mean high tide which, in many instances, may have been the reason for the acquisition of the property.

It is apparent also that the purpose of the state is not primarily to make a greater area available for public use, but to dispose of such accreted lands to private individuals and put a new upland owner between the grantees of the original upland owner and the line of mean high tide. That the state does not consider accretion as shore or beach, is evidenced by its sale thereof, for the state certainly would [fol. 59] not disregard the statutory declaration that

> [S]hore and beach of the Pacific Ocean, . . . between ordinary high tide [mean high tide] and extreme low tide . . . shall remain forever open to the use of the public. [RCW 79.16.170]

and that no part thereof "shall ever be sold, conveyed, leased or otherwise disposed of." (RCW 79.16.171)

3. The really pertinent decision in Washington is not the *Eisenbach* case, which has nothing to do with imperceptible accretions, but the case of *Ghione* v. *State,* 26 Wn.2d 635, 175 P.2d 955 (1946). The state asserted there, as it does here, that it was entitled to all lands covered by navigable waters in 1889. The state also contended that it was entitled to all lands submerged by navigable waters subsequent to 1889.

The court discussed a number of cases—including *Eisenbach* and an 1899 statute on accretions (cited here by the majority—before adopting a shifting boundary theory which vested title to imperceptible accretions in the upland owner. The majority seeks to distinguish the *Ghione* case because it involved a river, but the court there believed that the shifting boundary theory applied "to both tidewaters and fresh waters," and there is no apparent reason for distinguishing between them.

4. No consideration has been given to the effect of the fixed boundary theory where there has been an erosion instead of an accretion. We can only speculate as to how [fol. 60] the majority opinion would read if this were an erosion case. At certain places, the 1899 line of ordinary high tide or mean high tide is now a long way out in the Pacific Ocean, in consequence of erosion, and the upland owner has seen his upland become tideland to which he has heretofore thought he had no title. Under the majority rule, the upland owner would continue to have title to the 1889 line, and the public, seemingly, would have to swim to enjoy its "highway" and beach rights. Only under the shift-

ing boundary rule will the rights of the public always be preserved in the property in the beds and shores of all navigable waters in the state, up to and including the line of ordinary high tide—"in waters where the tide ebbs and flows."

I would follow the federal cases, adhere to the shifting boundary rule, and affirm the trial court.

Hill, J.

I concur with Judge Hill.

Hunter, J.

[fol. 62]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 37583

STELLA HUGHES, Respondent,

vs.

STATE OF WASHINGTON, Appellant.

PETITION FOR RE-HEARING EN BANC BY RESPONDENT

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the State of Washington:

The respondent, Stella Hughes, presents this petition for a re-hearing in the above entitled cause, and in support thereof respectfully shows:

1. The appeal in this cause was argued before this court on January 29, 1965.

2. On January 20, 1966 this court rendered its decision in favor of appellant and against respondent, reversing

the judgment of the Superior Court of Pacific County, Washington. The respondent seeks a re-hearing upon the following grounds:

A

Federal Law Is Determinative of the Question Herein Presented

"The question as to the extent of this Federal grant, that is, as to the limit of the land conveyed where the boundary between the upland and the tide land, is necessarily a Federal question." Borax, Ltd. v. Los Angeles, 296 U.S. 10 (1935), and U.S. v. The State of Washington, 294 Fed. 2nd 830 (9th Circuit, 1961).

Granted that accretion was not expressly involved in [fol. 63] the Borax case, yet the court held that the boundary between tide lands granted by the state and upland granted by the United States was the line of high tide by the judgment affirming the Circuit Court's reversal of the District Court (74 F. 2nd, 901), and ordering determination of the actual line of mean high tide clearly referred to the line as it then existed, regardless of the intervening modifications by accretion or erosion. In the same case, on page 907, this court of appeals said,

> "The question of the mean high tide line is one of fact, and the effect of the shifting of that line on the rights to tide lands and upland are well settled."

In Borax, Ltd., supra, the court clearly stated,

> "The tide land extends to the high water mark . . . this does not mean, as petitioners contend, a factual mark made upon the ground by the water; it means the line of high water as determined by the course of the tides."

The Supreme Court simply followed the Circuit Court of Appeals in its previous opinion reported in 74 F. 2nd, page 904:

> "The appellant, however, contends for the rule that the boundary line between the tide lands and the upland is determined 'by definite mark upon the ground which has been left by the tide'. This rule as to a definite mark is applicable to the high water line of streams, but not to a boundary line of tide waters."

The Supreme Court as well as the Circuit Court of Appeals took judicial notice of the fact that astronomical influences produce a complete tidal cycle every 18.6 years, and held that "ordinary high water should be taken as the mean elevation of all tides at the point in question," and directed that the "ordinary high water mark" should be ascertained by locating on the ground the line of that mean [fol. 64] elevation. 296 U.S. 10, 26-27; 74 F. 2nd 901-906.

Judge Hamley, speaking for the court in United States of America v. State of Washington, 294 Fed. 2nd 830, stated flatly, that while no question of accretion was involved in Borax, the principle there announced was equally applicable where the problem is one of determining whether imperceptible accretions go with the upland.

> "Therefore, contrary to the majority opinion herein, the Federal Court has also concluded that 'State law does not govern.' If the upland owner is entitled to the imperceptible accretions, it is because this is an attribute of title reserved to, or obtained by, grant from the government." (294 Fed. 2nd 831)

The state may not take from riparian owners, rights given to them by Federal patent; see Packer v. Bird, 137 U.S. 661-669 (1891), where the court, in considering the question whether a Federal patent bounded by a navigable river gave any rights below the high water mark, said,

> "Whatever incidents or rights attached to the ownership of property conveyed by the government will be determined by the states *subject to the conditions that their rules do not impair the efficacy of the grants or*

the use and enjoyment of the property by the grantee." (emphasis supplied)

Appellant, in his brief on page 38, argues that the Government's rights over its own property, whatever they may be, should not be permitted to override the sovereign rights of the state over its property. This conclusion, however, was met squarely and decided to the contrary by the Circuit Court of Appeals, 294 Fed. 2nd 830. It may be argued that Judge Hamley was mistaken, but his decision exists, and permanently.

[fol. 65] B

The Law of the State of Washington Follows the Federal Rule and the Common Law

Article XVII Tide Lands

1. Declaration of State Ownership. The State of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes; Provided, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state.

2. Disclaimer of Certain Lands. The State of Washington disclaims all title in and claim to all tide, swamp and overflowed lands, patented by the United States; Provided, the same is not impeached for fraud.

In Scurry v. Jones, 4 Wash. 468, the court held,

"The disclaimer by the state (Const. Art. 17, sec. 2) of all title in and claim to all tide, swamp and overflowed lands patented by the United States' while not in terms confirmatory of titles so acquired, is substan-

tially a grant to the patentees of the interest of the state in such lands."

The disclaimer clause was again invoked by the court in Cogswell v. Forrest, 14 Wash. 1, in which the court held,

"The state can assert no title to patented tide lands although lying below the line of ordinary high tide."

The appellant in this case was the Commissioner of Public Lands, and it is interesting to note the statement of the court on page 2:

"It is contended by the appellants that the meander lines run along the shores of bodies of water by United States surveyors are not lines of boundary, but lines run merely to locate the shore line and determine the area of the upland from which the price is computed, and that the body of water along which the meander lines are run is the true boundary; and that in this state the boundary line of lands adjoining tidal waters [fol. 66] is that prevailing at common law: to-wit, *mean high water mark.*"

In Washougal Transportation Co. v. Dalles, etc. Nav. Co., 27 Wash., page 490, on page 496, it is said:

"What title or right passes under a grant of lands made by the United States is a Federal question, and the judgment of a State Supreme Court is within the appellate jurisdiction of the Federal Supreme Court." Shively v. Bowlby, 152 U.S. 1 (14 Sup. Ct. 548)

The majority herein concludes that Ghione v. State, 26 Wash. 2nd 635, is not apposite since tide lands as such were not involved, and yet the very argument of the Attorney General in that case is the same as advanced in the instant case. The court, in answering that argument, refers to Article 17, section 1 (supra) where it is stated in plain and unmistakable language,

"Includes the beds and shores of all navigable waters . . . where the tide ebbs and flows . . . banks of all navigable rivers and lakes."

It also states on page 647 that the conclusion sought for by the Attorney General is contrary to the universal and convenient rule (page 645),

"This rule of accretion is everywhere admitted, and applies to both tide waters and fresh waters, and further holds that the general principles of American law relating to control over the beds and shores of its navigable waters is not necessarily inconsistent with the established rule that water boundaries vary with the water line." (page 648)

To interpret this constitutional language governing all navigable waters as having diverse results may be termed illogical. In the case of New Whatcom v. Fairhaven Land Co., 24 Wash., on page 500, the court clearly stated,

"The provision of Article 17, section 1 of the Constitution was evidently for the purpose of establishing the right of the state to the beds of all navigable [fol. 67] waters in the state; whether lakes or rivers, fresh or salt, to the same extent the Crown had in England in the sea and in the arms and inlets thereof, and in the tidal rivers; and to eliminate the distinctions existing under the rule of the common law in this respect."

The court further states, on page 501, that this Article

"Expressly protects all persons in asserting their claims to vested rights."

It also states,

"The provisions of Article 1, section 16 of the Constitution protect private property from confiscation for public use."

Decided subsequently to the Ghione case are Harkins v. Del Pozzi, 50 Wash. 2nd 237 (1957), and Christensen v. Gensman, 53 Wash. 2nd 313 (1958).

The Harkins case involved the boundary line between the state's grantee of tide lands and the upland owner, and the court, on pages 240-241, said,

> "At the time of statehood, the State of Washington acquired from the Federal government the ownership of the beds and shores of all navigable waters in the state, up to and including the *line of ordinary high tide in waters where the tide ebbs and flows.* Art. XVII, sec. 1, State Constitution.
>
> "The conveyance from the State of Washington of second-class tide lands adjacent to government lot 3 to respondent's predecessor conveyed only the title which the state had, namely, to the line of ordinary high tide."

and since it could not determine the extent of the boundary line prior to 1889, held the meander line when located landward of the line of ordinary high tide is not the true boundary line between the upland and the tide lands; the true boundary in such cases being the line of ordinary high tide.

In the Christensen case arose the question of the bound- [fol. 68] ary line between the tide land and upland on the Wallicut River in an area affected by the ebb and flow of the tide, and the case was remanded for a new trial limited to the determination of the line of ordinary high tide on the south side of the Wallicut River. This case was tried and decided upon the theory (the state being a party) that the boundary line in tidal waters was determined by the line of mean high tide. Here, as in the other cases discussed, the court is referring to the *present* line of ordinary high tide, and not as it may have been determined to be in 1889.

We have been unable to find any act of the legislature that applies only to river bed lands and not to tide lands. On the other hand, Article 17 applies to both tide and shore lands, as do all other legislative enactments. As the court pointed out in the Ghione case, the accretions mentioned in the tide land acts are not accretions to the upland, but are accretions at the lower water line.

If the Ghione case is to be restricted to rivers and streams, then the majority has adopted a new rule applying only to tide lands. It should be remembered that the majority of rivers and streams are affected by the rise and fall of the tide, and we have the anomalous result that water boundaries of rivers and lakes shall be determined by one rule and tidal waters by another rule. In the future the majority opinion could be reasonably restricted to tidal waters bordering only upon the Pacific Ocean.

Implicit in the majority opinion is the reasoning that there is a distinction between the rights of the Federal Government and the rights of its patentees. Equally im-
[fol. 69] plicit is the reasoning that rights once vested in a patentee as to the boundaries of his land vary from the rights of the government as the original owner. To us it appears reasonable that the phrase "vested rights" means fixed and permanent. If these rights vested in the patentees prior to 1889, it is logical to presume that neither the Federal Government nor the State of Washington can interfere with these rights.

C

State Policy

Admittedly neither the briefs nor arguments of counsel adverted to the fact that all deeds from the State of Washington to the upland owner of lands described by laws of 1929, Chap. 78, as

> ". . . on the land side of the inner boundary of the highway reservation made by Chap. CV and CX, Laws

of 1901, same being a line of ordinary high tide as the same is now located, or as it may hereafter exist."

describe these lands as follows:

"Tidelands of the Second Class lying above the line of ordinary high tide as this same is now located, or as it may hereafter exist."

Obviously this description is both inept and inexact.

As an example, one of the exhibits introduced by the state is a judgment of the Superior Court of Grays Harbor County entitled "Ralph Minard et al. v. State of Washington, No. 47939." The line described as the line of ordinary high tide as of November 11, 1889, and as surveyed by the state in Parcels "B" through "H" actually extends westerly into the Pacific Ocean for over a mile north and south to an actual depth of several fathoms beyond the line of extreme low tide. The state recognized its dilemma, but sold this stretch of land as if it actually existed. It is difficult [fol. 70] to equate the state's argument that a fixed boundary exists on tidal waters, and its practice of issuing deeds containing a shifting boundary.

D

Importance of Question

It is finally submitted that a re-hearing should be granted; first, because it is a case of first impression before this court, and secondly, it involves incalculable economic and social interest for hundreds of title holders.

Respectfully submitted,

Charles B. Welsh, Attorney for Respondent.

[fol. 71]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 37583

Department .....

[Title omitted]

ORDER CALLING FOR ANSWER TO PETITION FOR REHEARING—
February 24, 1966

The Court having considered the respondent's petition for rehearing herein,

It Is Ordered that the Clerk mail to the attorneys of the appellant a copy of the original petition, with a request that they file three copies of an answer thereto within fifteen days and serve a copy thereof on opposing counsel.

Dated this 24th day of February, 1966.

By the Court:

Hugh J. Rosellini, Chief Justice.

[File endorsement omitted]

[fol. 73]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 37583

STELLA HUGHES, Respondent,

v.

STATE OF WASHINGTON, Appellant.

ANSWER TO PETITION FOR REHEARING—March 11, 1966

By order entered February 24, 1966, this court has requested an answer by the State of Washington to Respondent Stella Hughes' Petition for Rehearing.[1]

The Petition for Rehearing should be denied.

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[1] This court's opinion is reported as Hughes v. State, 67 W.D.2d 787, 410 P.2d 20 (1966).

I

The function of a petition for rehearing is to bring to the court's attention, for correction, errors of fact or law [fol. 74] assertedly made by the court in deciding a case; it is not the office of a petition to reopen a case for reargument and reconsideration of points, authorities, or matters already fully considered by the court[2] or to interject new issues into a case.[3] One of the best statements of the purpose and scope of petitions for rehearing is found in Rule 18(1) of the New Mexico Supreme Court:

> The motion for rehearing shall be directed to the opinion of the court, and shall distinctly specify wherein the same is erroneous; but shall not renew contentions previously argued and submitted and expressly disposed of except to invoke an earlier decision, a statute or a rule of court deemed controlling and previously overlooked. The motion may also direct the court's attention to fundamental or jurisdictional error not previously presented, and may renew any contention deemed controlling and not expressly passed upon.

[fol. 75]

II

Stella Hughes, by her petition for rehearing, sets forth four grounds to justify a rehearing.

First, that federal law as announced in *Borax, Ltd.* v. *Los Angeles*[4] and *United States* v. *Washington,*[5] is con-

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[2] Louisell & Degnan, *Rehearing in American Appellate Courts,* 44 Calif. L. Rev. 627 (1956); 5 Am. Jur. 2d *Appeal & Error* § 978 (1962) 5 C.J.S. *Appeal & Error* § 1410 (1958).

[3] State *ex rel.* Milwaukee Terminal Ry. v. Superior Court, 54 Wash. 365, 377, 103 Pac. 469, 104 Pac. 175 (1909); State v. Hazzard, 76 Wash. 586, 137 Pac. 143 (1913); Holohan v. Melville, 41 Wn.2d 380, 408, 249 P.2d 777 (1952); Nostrand v. Little, 58 Wn. 2d 111, 361 P.2d 551 (1961).

[4] 296 U.S. 10 (1935).

[5] 294 F.2d 830 (9th Cir. 1961).

trolling and renders a consideration of state constitutional and statutory law superfluous.[6]

Second, that the court's decision on state law overlooked or is inconsistent with its prior decisions[7] in *Scurry* v. *Jones,*[8] *Cogswell* v. *Forrest,*[9] *Washougal Transp. Co.* v. *Dallas, Etc. Nav. Co.,*[10] *New Whatcom* v. *Fairhaven Land* [fol. 76] *Co.,*[11] *Harkins* v. *Del Pozzi,*[12] and *Christensen* v. *Gensman.*[13]

Third, that the court did not consider the language of deeds given by the state under authority of chapter 78, Laws of 1929, particularly as applied to the Ralph Minard property in Grays Harbor County.

Fourth, that the importance of the questions before the court alone justify a rehearing.

None of the grounds set forth by Petitioner Stella Hughes justifies a rehearing.

III

The petitioner's first and fourth grounds constitute nothing more than a request that this court reopen the case for reargument and reconsideration of matters fully considered and decided by the court. This is not the purpose of a rehearing, as we have already seen. (There can

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[6] Petition for Rehearing 1-3.

[7] Petition for Rehearing 4-8.

[8] 4 Wash. 468, 30 Pac. 726 (1892).

[9] 14 Wash. 1, 43 Pac. 1098 (1896).

[10] 27 Wash. 490, 68 Pac. 74 (1902).

[11] 24 Wash. 493, 64 Pac. 735 (1901).

[12] 50 Wn.2d 237, 310 P.2d 532 (1957).

[13] 53 Wn.2d 313, 333 P.2d 658 (1958).

be no doubt about the fact of full consideration. Witness the [fol. 77] oral opinion of the trial court, the briefs of counsel, and the majority and dissenting opinions in this cause.)

The petitioner's second ground for rehearing, insofar as it relates to the cases of *Washougal Transp. Co.* v. *Dallas, Etc., Nav. Co.*[14] and *Harkins* v. *Del Pozzi*[15] must be similarly dismissed. Both cases were expressly brought to the attention of the court and cited by the majority or dissenting opinions or both.

It is true that the remaining cases were not expressly cited to the court. Nonetheless their citation now does not justify a rehearing because none of the cases have any bearing on the matters in issue in this case. *Scurry* v. *Jones*[16] and *Cogswell* v. *Forrest*[17] were concerned with the "disclaimer clause" of section 2, article 17 of the constitu- [fol. 78] tion. The court held the clause operated as a grant of tidelands to holders of upland patents that purportedly included tidelands. *New Whatcom* v. *Fairhaven Land Co.*[18] holds that a riparian owner on a *non-navigable* stream is entitled to compensation for the diverting of water from the stream for general domestic and municipal use. *Christensen* v. *Gensman*[19] (contrary to petitioner's suggestion) was not tried on any theory different than the one here urged by the State. The dikes along the river forestalled any issue of accretion, and following this court's judgment, the plaintiff proposed to locate the 1889 line of ordinary high tide in accordance with the rule of *Harkins* v. *Del Pozzi*.[20] Thereafter the case was settled without further

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[14] 27 Wash. 490, 68 Pac. 74 (1902).

[15] 50 Wn.2d 237, 310 P.2d 532 (1957).

[16] 4 Wash. 468, 30 Pac. 726 (1892).

[17] 14 Wash. 1, 43 Pac. 1098 (1896).

[18] 24 Wash. 493, 64 Pac. 735 (1901).

[19] 53 Wn.2d 313, 333 P.2d 658 (1958).

[20] 50 Wn.2d 237, 310 P.2d 532 (1957).

[fol. 79] trial because all parties agreed to the location of the line of ordinary high tide.[21]

The petitioner's third ground for rehearing is apparently a suggestion that counsel have overlooked facts about past administrative action by the state which has a bearing on the court's decision. If true, of course, the court would want to set the record straight.[22] As we shall at once see, no fact has been overlooked by counsel or the court.

The first contention petitioner makes is that the Commissioner of Public Lands, when making sales of accreted lands under authority of chapter 78, Laws of 1929, referred [fol. 80] to the lands as "tidelands of the second class" (which they once were) rather than as something else. The contention is probably factually true although these facts are not a matter in the record before the court. But in any event it is hard to see how the commissioner's choice of descriptive words, rather than some alternative wording (such as "accreted tidelands" or "accreted uplands"), has any bearing on the issues decided here by the court. No matter what terminology was used, the state most definitely claimed the accreted land and asserted domination over it even to the extent of selling it.

The second contention of petitioner involves a mistake of fact by the petitioner herself. She refers to the 1889 line of ordinary high tide as fixed by the Grays Harbor Superior Court in the case of *Minard* v. *State of Washington,* Cause No. 47939,[23] and asserts that this line is located in "several

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[21] Matters occurring after the filing of this court's opinion are not a matter of public record. We set them out here only to answer the petitioner's assertions that go beyond the public record (and only after refreshing our memory by reviewing our own litigation file).

[22] *E.g.* Union Wharf Co. v. Katz, 11 Wash. 407, 39 Pac. 647 (1893), *reversing original opinion,* 8 Wash. 389, 36 Pac. 276 (1894); Dabney v. Stearns, 73 Wash. 583, 132 Pac. 400 (1913); Armstrong v. Burkett, 104 Wash. 476, 480, 180 Pac. 873; Cooley v. Ben Paris Sporting Goods & Recreation Co., 107 P.2d 347 (Wash. 1940).

[23] The judgment in the Minard case is part of Defendant's Exhibit No. 2, Case No. 42.

fathoms [of water] beyond the line of extreme low tide." [fol. 81] Petitioner is simply mistaken. The actual location of the line is shown on Map 4 to Defendant's Exhibit 5. The area in question (now Ocean Shores) is the one area where the building up of land by accretion has been most pronounced.

IV

Conclusion

A petition for rehearing is a part of the appellate procedure authorized by the rules of this court.[24] The right to file such a petition therefore is not to be deemed an empty formality as though such petitions will as a matter of course be denied.[25] Yet we must be cognizant of the fact pointed out by Justice Frankfurter, an acknowledged authority on appellate procedure, that:[26]

> [fol. 82] Rehearings are not a healthy step in the judicial procedure. . . . If petitions for rehearing were justified, except in rare instances, it would bespeak serious defects in the work of the courts of appeals, an assumption which must be rejected.

We have accordingly reviewed the petition now before the court in the light of those rules which have been accepted by this and other appellate courts to prevent petitions for rehearing from becoming mere formalities, rejected as a matter of course. There is no basis, in the light of these rules, for granting a rehearing.

We note only in concluding, that if it were the office of a petition for rehearing to reopen a case for reargument and reconsideration of matters already argued and

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[24] Rule 50, Rules on Appeal.

[25] *Cf.* Flynn v. United States, 99 L. Ed. 1298 (1955) (opinion of Justice Frankfurter in chambers).

[26] Western Pacific Railroad Corp. v. Western Pacific Railroad Co., 345 U.S. 247, 270 (1953).

decided, nothing would be gained by reopening this case. We have nothing further to add to what we have already said and argued; the petitioner has nothing further to add that in any way affects the court's decision, as we have seen above; and the thorough and scholarly opinion of the court itself completely dispels any intimation that court was not [fol. 83] fully informed on the law and issues in this case.

Respondent Stella Hughes' Petition for Rehearing should be denied.

Respectfully submitted,

John J. O'Connell, Attorney General, By Harold T. Hartinger, Assistant Attorney General, Attorneys for Appellant.

March 11, 1966.

Temple of Justice, Olympia, Washington 98501, Telephone 753-5318, Area Code 206.

[fol. 84] Affidavit of Service (omitted in printing).

[fol. 88]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 37583

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—April 14, 1966

The Court having considered the respondent's petition for a rehearing herein together with the appellant's answer thereto, and a majority of the Judges being of the opinion that it should be denied,

It Is Ordered that the petition be and it is hereby denied.

Dated this 14th day of April, 1966.

By the Court:

Hugh J. Rosellini, Chief Justice.

67 W.D.2d 787

[fol. 89]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 37583

Pacific County No. 14546

STELLA HUGHES, Respondent,

v.

THE STATE OF WASHINGTON, Appellant.

REMITTITUR—April 14, 1966

This is to certify that the opinion of the Supreme Court of the State of Washington filed on January 20, 1966, became the final judgment of this court in the above entitled case on April 14, 1966. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached certified copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

Three Hundred Eighteen and 61/100 ($318.61) Dollars in favor of appellant and against respondent.

The Petition for Rehearing was Denied by an Order filed April 14, 1966.

cc: Court Reporter; Hon. John J. O'Connell; Mr. Harold T. Hartinger; Mr. Laurel L. Tiller; Mr. Charles B. Welsh.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 93] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 94]

SUPREME COURT OF THE UNITED STATES

No. 339—October Term, 1966

STELLA HUGHES, Petitioner,

v.

WASHINGTON.

ORDER ALLOWING CERTIORARI—January 9, 1967

The petition herein for a writ of certiorari to the Supreme Court of the State of Washington is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILED
JUL 12 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. 339

STELLA HUGHES,
Petitioner,

vs.

STATE OF WASHINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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Attorneys for Petitioner

IN THE

Supreme Court of the United States

October Term, 1965

No.....

STELLA HUGHES,

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IN THE

Supreme Court of the United States

October Term, 1965

No.....

STELLA HUGHES,
Petitioner,

vs.

STATE OF WASHINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Washington, in its Cause, No. 37583, entered in the above entitled case on January 20, 1966, published in the official Advance Sheets of that Court as 67 Wn. Dec.(2d) No. 17, 787; 410 P.2d. 20 and printed in Appendix J hereto, pp. 59. Petition for rehearing was denied on April 14, 1966, without opinion, and the remittitur of the Supreme Court of the State of Washington was sent down to the trial court on said date and is printed in Appendix L hereto, pp. 94.

Citations to Opinions Below

The opinion of the trial court, the Superior Court of the State of Washington in and for Pacific County, in its Cause No. 14546, is unreported, but printed in Appendix E hereto, pp. 19.

The opinion of the Supreme Court of the State of Washington is not yet published in the permanent volumes of that court, but it is printed in Appendix J hereto, pp. 59, and is printed in the official Advance Sheets of the court as 67 Wn. Dec. (2d), No. 17, 787, and in 410 P.(2d) 20.

Jurisdiction

The jurisdiction of this court is invoked under 28 U.S.C. §1257(3). The decision of the Supreme Court of the State of Washington was filed and entered on January 20, 1966, (Appendix J hereto, pp. 59). A timely petition for rehearing was filed and was denied on April 14, 1966, (Appendix K hereto, pp. 93). Rule 50 of Rules on Appeal of the Supreme Court of the State of Washington[1] provides that the filing

[1]Rule 50, Rules on Appeal of the State of Washington, R.C.W. Vol. O, Rules on Appeal, provides: "Every petition for rehearing shall be filed within thirty days after the opinion in the cause has been filed. No more than one petition shall be filed by the same party. The filing of a petition for rehearing shall suspend the decision of the court until the cause is finally deeermined."

of such petition suspends the decision of the court until the cause is finally determined. The Supreme Court of the State of Washington filed its remittitur on April 14, 1966, and same was sent down to the trial court on that date, Appendix L hereto, pp. 94.

Questions Presented

The petitioner, Stella Hughes, is the owner of real property bordering the Pacific Ocean and deraigns her title from a United States patent issued prior to the admission of the State of Washington to the United States. Imperceptible accretion has occurred on the westerly or ocean side of her property and, claiming right and title thereto under the United States and its patent, she sought to quiet title against adverse claims of the State of Washington to the accreted land. The question presented is, accordingly, as follows:

1. Whether the location and method of ascertaining the boundary of petitioner's real property bordering the Pacific Ocean, to which title is deraigned from a United States patent issued prior to the admission of the State of Washington to the Union, is a matter governed by federal law and the decisions of this court by which law and decisions the State of Washington is bound.

Constitutional Provisions and Statutes

No statute as such is involved in this matter, simply "the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law." **Borax Consolidated, Ltd. v. City of Los Angeles,** 296 U.S. 10, 56 S. Ct. 23, 80 L. Ed. 9.

The Fifth and Fourteenth Amendements to the United States Constitution are involved to the extent that if the decision of the Supreme Court of the State of Washington is permitted to stand, the petitioner will have been deprived of her property without due process of law, it will have been taken by the state without just compensation, and she will have been denied equal protection of the law.

The Fifth Amendment provides in part as follows:

> " . . . ; nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment of the United States Constitution provides in part as follows:

> " . . . ; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

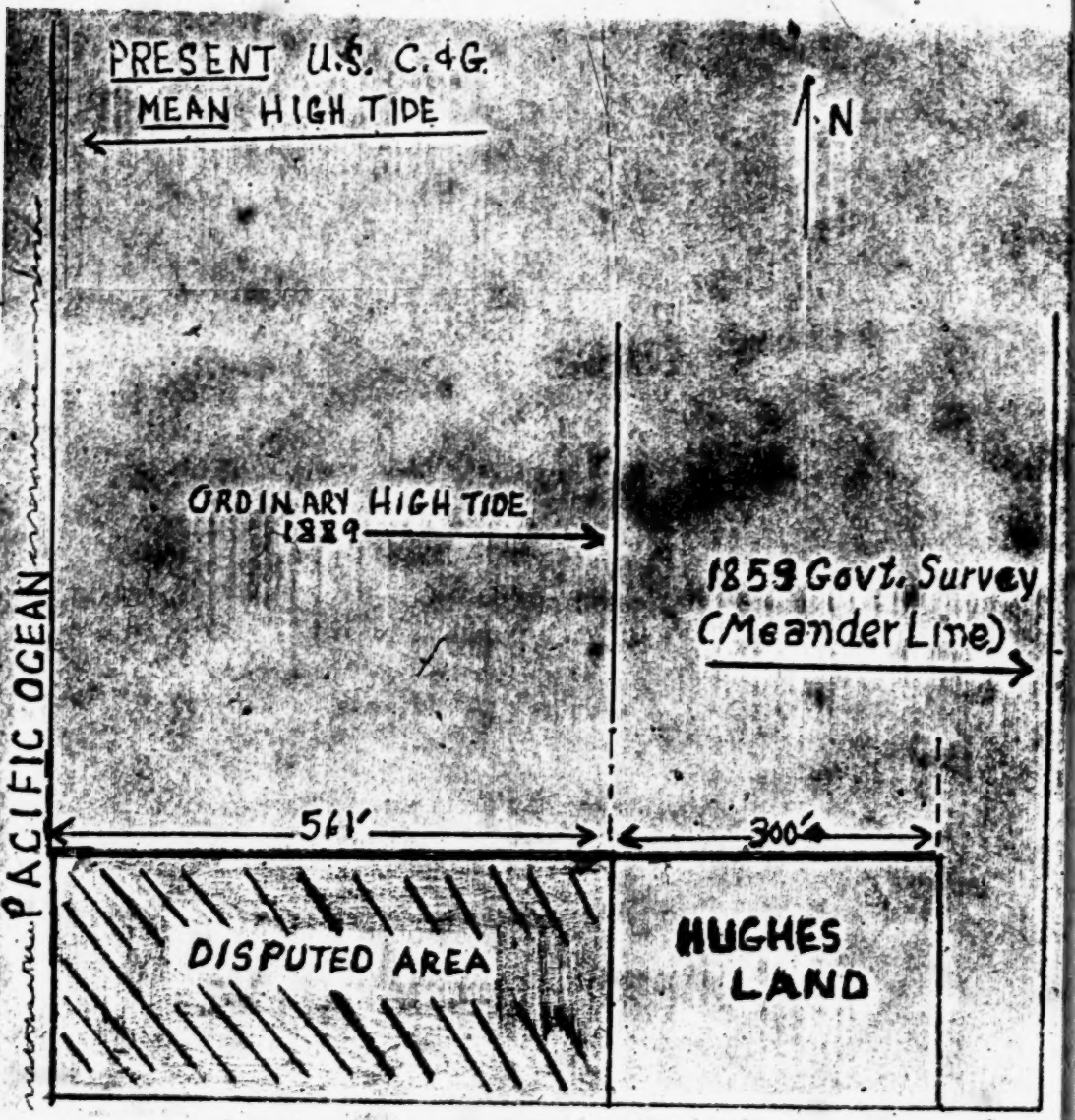
This action was brought in the Superior Court of the State of Washington in and for Pacific County by petitioner as plaintiff against the State of Washington. She is the owner of lands in that county extending to and bordering the Pacific Ocean. She deraigns her title from the United States Government by virtue of a patent issued prior to the State of Washington becoming a state of the Union. Imperceptible accretions have occurred to her lands to the west and she, as upland owner, believes and asserts that she continues to own her land to the Pacific Ocean, including any gradual accretions which have occurred over the years by reason of the natural forces of nature. The State of Washington, on the other hand, lays claim to the gradual accretions to the land of Mrs. Hughes occurring since statehood in 1889, and attempts to establish a new ownership between the property of the petitioner and the ocean.

Paragraph 2 of the complaint (Appendix A, pp. 5, 6) states the position of the petitioner:

> "Title to the above described real property was originally obtained from the United States government prior to 1889 and the westerly boundary line of said property is a line corresponding to the line of mean high tide of the Pacific Ocean, and defendant State of Washington claims some right, title or interest easterly of said west bound-

ary line but any such claim on the part of the State of Washington is inferior to the right of plaintiff herein."

The State of Washington, in its answer and cross complaint (Appendix B pp 10, 11) denied that this was the dividing line and alleges that the common and federal law had been changed by local court decisions, administrative construction and legislative action and contended that the boundary line is a line of ordinary high tide as of November 11, 1889 (the date of statehood) and that such line is permanent and unchanging. The conflicting contentions of the parties and the substantial depth of the disputed property is depicted by the following compiled map.


PRESENT U.S. C.&G.
MEAN HIGH TIDE
N
ORDINARY HIGH TIDE
1889
1859 Govt. Survey
(Meander Line)
PACIFIC OCEAN
561'
300'
DISPUTED AREA
HUGHES
LAND

Thus, a controlling federal question was first raised by the pleadings.

The case was heard on admitted facts and exhibits consisting of certain superior court decisions and maps subject to objections as to relevancy (Appendix F pp. 21). The trial court was advised of and recognized the federal question at the outset of the trial (Appendix F pp. 21, 24).

> "MR. WELSH: . . . . . This is a representative case among many. Each of these cases, as well as the one at present . . . the original title was acquired by plaintiff or predecessor in interest prior to 1889 from the United States government.
>
> "THE COURT: Prior to statehood?
>
> "MR. WELSH: Prior to statehood.
>
> "THE COURT: As a patent from the United States government?
>
> "MR. WELSH: Yes."

Counsel for the State of Washington also recognized the existence of a controlling federal question at the outset (Appendix F, pp. 21, 26)).

> "MR. HARTINGER: The court of appeals has decided the state law must be disregarded and that federal law as developed by the federal court must be applied. Basicly this is our issue."

At the conclusion of the trial the trial court de-

cided in favor of the petitioner and dealt with the federal question as follows (Appendix F, pp. 21, 33):

> "Whether the state law does apply or whether Federal Law should be applied. I just don't see any escape from the decision in the **Borax Consolidated v. Los Angeles** case in 296 U.S. 10. This is a 1935 case where 28 years ago the opinion was written by Chief Justice Charles Evans Hughes and the Ninth Circuit Court of Appeals decision in United States vs. the State of Washington in 1961, 26 years later, where the decision was written by Justice Hamley, who was formerly a member of the Supreme Court of the State of Washington, that is, the 294 F. (2d) 830 case. I think those cases decide specifically the question that is involved here. The Borax case, now 28 years old, hasn't been departed from that I can find. And the Sampson Johns case, the Ninth Circuit case in '61, was a Federal Case. He was a resident of the State. The State has a lawyer, who for many years felt that the Washington rule — the local law — should be applied. The Circuit Court reversed him and specifically held against the position of the State on both phases of the question. In the Borax case Justice Hughes said — this was quoted in the Sampson Johns' case — 'Petitioners claim under a federal patent which, according to the plat, purported to convey land bordering on the Pacific Ocean. There is no question that the United States was free to convey the upland, and the patent affords no ground for holding that it did not convey all the title that the United States had in the premises. The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect

> of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law.'"

The trial court entered judgment for petitioner describing and quieting title to her land as follows (Appendix E., pp. 19):

> "The western boundary of which is the line of mean high tides of the Pacific Ocean as it now or hereafter may exist, which line is the average elevation of all high tides as observed at a location through a complete tidal cycle of 18.6 years, free and clear of any right, title, claim or interest of the State of Washington to any lands accreted to the original donation land claim either prior or subsequent to November 11, 1889."

Respondent appealed from the judgment to the Supreme Court of the State of Washington. The State of Washington in its brief on appeal filed in the State Supreme Court (Appendix G, pp. 38, 40) recognized the controlling federal question as determined by the trial court as follows:

> " . . . but nevertheless felt compelled by the federal court decisions to establish the boundary solely as a matter of federal judgemade law simply because title to Mrs. Hughes' property can be traced back to a federal patent issued prior to statehood."

On appeal to the State Supreme Court, petitioner, in her answering brief, argued for the application of federal law as follows (Appendix H, pp. 50, 51):

"ARGUMENT IN SUPPORT OF JUDGMENT. The lower court was impelled to follow the decisions in Borax Consolidated Ltd. v. Los Angeles, 296 U.S. 10 (1935) and U.S. v. State of Washington 294 Fed. 2d 830, (9th Circuit 1961) Certiorari denied. The opinion in this latter case was written by Judge Hamley, a former member of this state's supreme court who on page 2 of his opinion said:

"'Declining to be bound in its determination by the definition of the term "ordinary high water mark" under California law, the Court said:

"'"The question as to the extent of this federal grant, that is, as to the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law."'" (Citing cases.)

Respondent, State of Washington, in its reply brief (Appendix I, pp. 54, 55) restates the question involved:

"BORAX, LTD. V. LOS ANGELES AND UNITED STATES V. WASHINGTON DO NOT NULLIFY STATE REAL PROPERTY LAW

Mrs. Hughes contends that this court is compelled to affirm the judgment of the court below on authority of Borax Ltd. v. Los Angeles and United States v. Washington without regard to state law, be it statute or judicial decision. The state disputes this contention."

The Supreme Court of the State of Washington reversed the lower court and said (Appendix J, pp. 59, 81):

"In the instant case plaintiff's (respondent's) argument in support of judgment of the trial court orbits around three decisions: **Borax Consol. Ltd. v. Los Angeles** 296 U.S. 10, 80 L. Ed. 9, 56 Sup. Ct. 23 (1935), **Ghione v. State,** 26 Wn. 2d 635, 175 P. 2d 955 (1946) and **United States v. Washington,** 294 F.2d 830 (9th Cir. 1961). It was apparently the third decision which triggered this action.

"We do not find the three cases apposite. **Borax, supra,** establishes the rule that mean high tide (the average height of all high waters through a complete tidal cycle) is the criterion for 'ordinary high water'. The case does not involve the question of accretion. ..... We do not question the federal government's right over its own property, but the rules applied by the United States Court of Appeals do not override the established rules of the property of the sovereign state in a controversy between it and one of its citizens."

Oral argument in the Supreme Court of the State of Washington was heard **en banc,** and the dissenting pinion states (Appendix J, pp. 59, 84):

"Hill, J. (dissenting) — I find myself lost in admiration at the scholarship and erudition manifested in the majority opinion. However, all the legal signposts that I can read **and understand** point in the opposite direction, so I am compelled to dissent.

"We must decide whether the westerly (seaward) boundary of Stella Hughes' property is the present mean high tide line, or whether it is the line of ordinary high tide as the state of Washington computes it to have been on November 11, 1889. It is as really as simple as that.

"Signpost 1: Location of plaintiff's westerly (seaward) boundary is a federal question.

"The plaintiff traces her title to a federal patent issued before Washington became a state. This court recognized a long time ago the right of federal courts to ascertain the limit of federal grants. See **Washougal & LaCamas Transp. Co. v. Dalles, P. & A. Nav. Co.**, 27 Wash. 490, 496, 68 Pac. 74 (1902). In **Borax Consol., Ltd. v. Los Angeles**, 296 U.S. 10, 80 L. Ed. 9, 56 Sup. Ct. 23 (1935), it was stated that when a federal patent is involved, the boundary between upland and tideland is necessarily a federal question. True, no accretions were involved, but it seems unlikely that this would have made any difference as to whether federal law should be applied.

"Signpost 2: Federal law being applicable, the 'shifting boundary theory' applies.

"If federal law is applicable, then **United States v. Washington**, 294 F.2d 830 (9th Cir. 1961), cert. den. 369 U.S. 817 (1962), is decisive. That case holds that imperceptible accretions go with the uplands whenever title to the uplands is derived from the United States."

The majority decision and opinion of the Washington Supreme Court was to the effect that the imperceptible accretions occurring after statehood became the property of the state and not of the upland owner, either because it felt the federal property rules in such cases were not apposite or could not serve to override the concept of the Washington State Su-

preme Court as to what the established rules of property should be in such situation.

After the rendition of its decision by the Supreme Court of the State of Washington, petitioner filed a petition for rehearing again posed the federal question, which was denied on April 14, 1966, (Appendix K, pp. 93), and on the same date the remittitur was sent down (Appendix L, pp. 94).

The petitioner now timely seeks redress in this court by this petition.

Reasons For Granting The Writ

1. Rule 19 of this court sets forth an important, if not controlling, reason for the granting of a writ in such a case as this in the following language:

> "Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

The Supreme Court of the State of Washington has held that imperceptible accretions occurring with respect to land owned by one who deraigns her title from a federal patent may be taken from that owner and a new ownership set up between her and the waters of the Pacific Ocean to which point the federal patent extended at the time of its issuance. But this

court held in **Borax Consol., Ltd. v. City of Los Angeles, 296** U.S. 10, 56 S. Ct. 23, 80 L.Ed. 9, that imperceptible accretions of this type are the property of the upland owner. The Ninth Circuit Court of Appeals in **United States v. The State of Washington**, 294 F.2d 830, 9th Cir. (1961), confronting essentially the same question that is here involved, felt the **Borax Consolidated** case to be controlling and held that imperceptible accretions occurring along the Washington coast belonged to the upland owners. The Supreme Court of the State of Washington, as long ago as 1902, in **Washougal & LaCamas Transportation Co. v. Dalles, Portland and Astoria Navigation Co.**, 27 Wash. 490, 68 Pac. 74, recognized that whatever title or right passes under a grant of lands by the United States is a federal question and "the judgment of a state supreme court thereon is within the appellate jurisdiction of the federal supreme court. **Shively v. Bowlby,** 152 U.S. 1 (14 Sup. Ct. 548)." Thus, we now have the Washington Supreme Court in this case determining a substantial federal question in a way probably not in accord with applicable decisions of this court. This is a situation which justifies a final and definitive decision on the matter by the Supreme Court of the United States.

2. This very question has remained unsettled for over 75 years. It was thought that the careful de-

cision of Judge Hamley of the Court of Appeals for the Ninth Circuit in **U.S. v. Washington, supra,** would finally and fairly set to rest the problem of boundaries along the Pacific Coast where the changing forces of nature produce accretion and erosion with respect to coastal lands. Now, unless this court grants certiorari and determines the matter, a situation would exist in which the State of Washington will pursue a course of taking and establishing its ownership and new ownerships in lands which this court, the federal courts and the common law have always held are owned by those who acquired the lands through a patent issued prior to statehood. The physical result will be a checkerboard pattern of ocean boundaries, some extending to mean high tide line of 1889, others to the present line of mean high tide, depending on date of acquisition and the court in which the litigant finds himself. Hundreds of separate ownerships, individual and municipal, miles of coastline as well as tidal water boundaries, are now questionable. Only confusion, dissatisfaction and controversy can arise from such a state of conflicting decisional law. This court should finally dispose of the matter by granting certiorari and determining this matter one way or another, once and for all.

3. To permit the decision of the Washington State Supreme Court to stand without review by this

court, if it be an erroneous decision and contrary to applicable federal and common law as contended, would be to permit the State of Washington to deprive this petitioner and other private citizens similarly situated of their property without due process of law; it would deny them the equal protection of the law, and would deprive them of their property without just compensation, all contrary to the Constitution of the United States.

Petitioner recognizes that this court is not interested in granting a petition simply because a state court may have committed an error in arriving at its decision. However, in this case, if federal law be controlling as petitioner contends and as the decisions of this court seem to indicate, then to permit the erroneous decision of the Washington Supreme Court to remain in effect has grave constitutional consequences which this court should not tolerate. The petitioner and others similarly situated, in reliance upon a right derived from the United States itself, have acquired and paid for property bordering the Pacific Ocean. This was the purpose for its acquisition. Natural forces over the years, which no man controls, have caused accretion of that property. The ocean border has moved westerly. It could just as easily have moved easterly, and the owners risked the loss of their property after it was purchased. Now, years later, the

State of Washington, contrary to the decisions of this Court and of the federal courts interpreting United States patents, and contrary to the common law, has decided to take the accreted property for its own use without compensation, setting up a new ownership between the upland owner and the ocean, to which the original property extended. If the Supreme Court of the State of Washington, in setting up that new ownership, is acting mistakenly and improperly, whether in good faith or not, its action undeniably produces the result of depriving these people of their property without just compensation, without due process of law, and of denying them equal protection of the laws. Such a wrong, whether unintentional or not, is a constitutional wrong which should be redressed by this court.

Conclusion

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1965

No. 339 1/15

STELLA HUGHES,
Petitioner,

vs.

STATE OF WASHINGTON,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF THE STATE OF WASHINGTON

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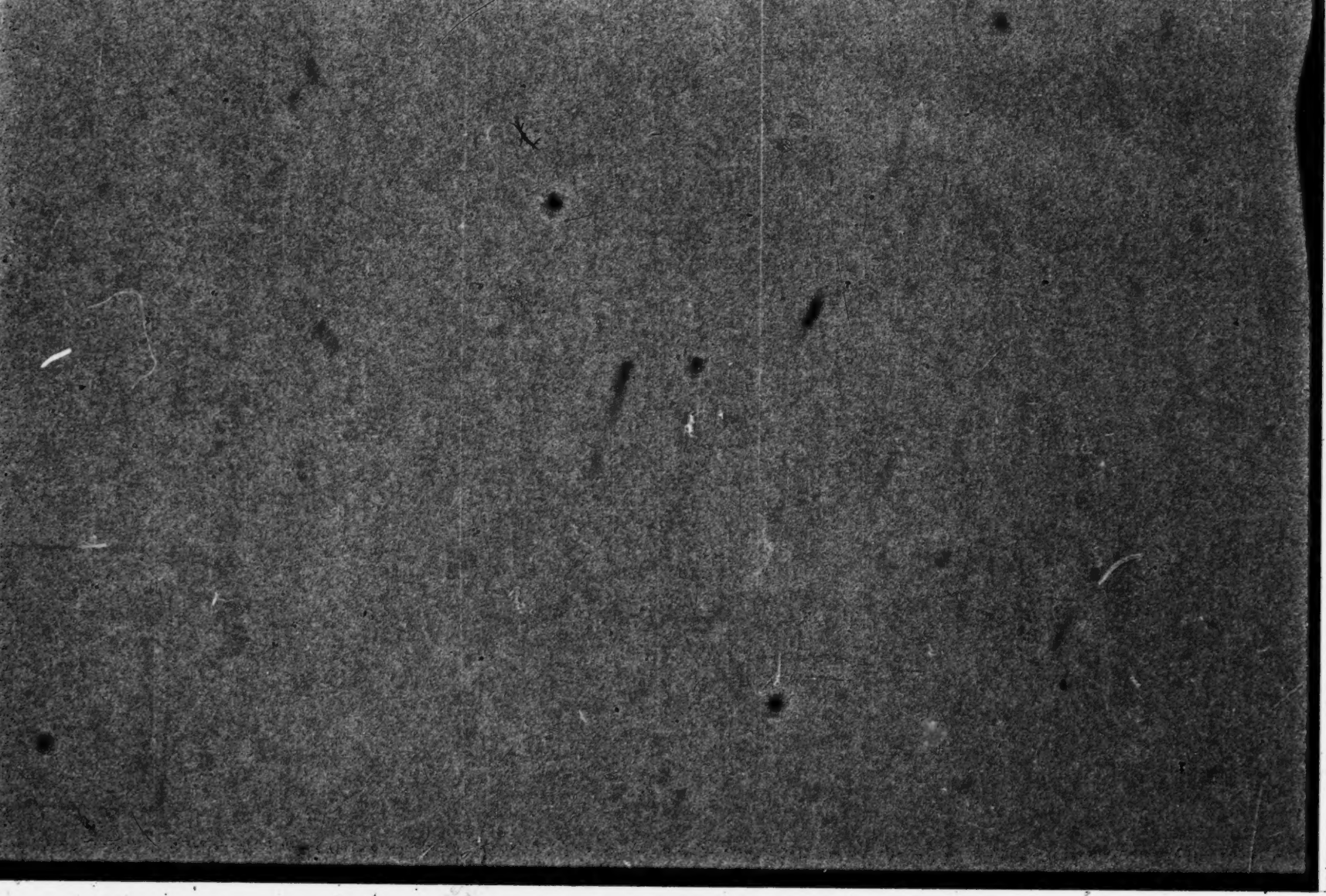

IN THE

Supreme Court of the United States

October Term, 1965

No. .....

STELLA HUGHES,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF THE STATE OF WASHINGTON

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APPENDIX "A"

IN THE

Supreme Court of the United States

October Term, 1965

No. .....

STELLA HUGHES,
Petitioner,

vs.

STATE OF WASHINGTON,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

SUMMONS AND COMPLAINT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PACIFIC COUNTY

STELLA HUGHES, Plaintiff vs. STATE OF WASHINGTON Defendant	No. 14546 COMPLAINT

Comes now plaintiff and for cause of action alleges:

1.

That plaintiff individually is the owner in fee simple title and in possession of the following described real property, to-wit:

Beginning at a point 1353 feet north from the line between Sections 4 and 9, Township 11 N. R. 11 West W.M. and 437.3 feet west from the west line of State Highway No. 12-A, thence north 226.6 feet, thence west 300 feet more or less to the line of ordinary high tide of the Pacific Ocean, thence South 226.6 feet, thence East 300 feet more or less to beginning.

2.

That title to the above described real property was originally obtained from the United States government prior to 1889 and the westerly boundary line of said property is a line corresponding to the line of mean high tide of the Pacific Ocean, and that defendant State of Washington claims some right, title or interest easterly of said west boundary line but any such claim on the part of the State of Washington is inferior to the right of plaintiff herein.

3.

That plaintiff and her predecessors in interest have been in the actual, open and notorious posses-

sion of the above described real property for more than ten years immediately last past, under the claim and color of title thereto, made in good faith, and during said time have paid all real estate taxes legally assessed thereon, and during said time no other party or parties have claimed or asserted any right, title or interest in and to said property.

WHEREFORE plaintiff prays that the court enter judgment herein establishing the westerly boundary line of plaintiff's property to the line of mean high tide of the Pacific Ocean and as against any right, title, claim or interest of the defendant, State of Washington.

CHARLES B. WELSH
Attorney for plaintiff

STATE OF WASHINGTON }
COUNTY OF PACIFIC } ss.

I, Charles B. Welsh being first duly sworn, depose and say that I am attorney for plaintiff in the above entitled action and proceedings, that I have read the foregoing complaint know the contents thereof, and that the same and the whole thereof is true as I verily believe That I make this verification for the reason that plaintiff is without the State of Washington.

CHARLES B. WELSH

Subscribed and sworn to before me this 19 day of September, 1962.

Jean Holbrook

Notary Public for the State of Washington, residing at South Bend, Washington.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF PACIFIC

STELLA HUGHES, Plaintiff

vs.

STATE OF WASHINGTON Defendant

SUMMONS

THE STATE OF WASHINGTON, to the said STATE OF WASHINGTON, Defendant.

You are hereby summoned to appear within twenty days after the service of this summons upon you, exclusive of the day of service, if served in the State of Washington, and within sixty days exclusive of the day of service if served without the State of Washington, and defend the above entitled action in the court aforesaid; and answer to the complaint of the Plaintiff and serve a copy of your answer upon the undersigned attorney for the said Plaintiff at their office below stated, and in case of your fail-

ure so to do, judgment will be rendered against you according to the demands of the complaint which will be filed with the clerk of said Court, and a true copy of which is herewith served upon you.

CHARLES B. WELSH
Attorney for plaintiff

Post Office and Office Address: 1112 W. Water St.,
South Bend, Washington

APPENDIX "B"

ANSWER AND CROSS CLAIM

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PACIFIC COUNTY

STELLA HUGHES, Plaintiff	No. 14546
vs.	ANSWER AND
STATE OF WASHINGTON,	CROSS-COMPLAINT

For answer to the complaint this defendant:

1. Disclaims all interest in the real estate described in paragraphs 1 and 2 of the complaint lying easterly of a line described as follows:

> Beginning at a point whose Y coordinate is 436,139.17 and whose X coordinate is 1,104.683.64, referred to the Washington Coordinate System, South Zone, and running thence on an azimuth of 1° 14' 05" 3412.79 feet to a point whose Y coordinate is 432,727.18 and whose X coordinate is 1,104,610.10, referred to said coordinate system.

2. Admits that it claims an interest in the lands lying westerly of the line described in paragraph 1 of this answer, and as to the lands it claims an interest in, the defendant denies all further allegations of paragraph 1, 2, and 3 of the complaint.

By way of cross-complaint, the defendant alleges:

1. It is one of the sovereign states of the United States of America, admitted to the Union on November 11, 1889.

2. The property described in paragraph 1 of the complaint borders upon the Pacific Ocean. Accretions have formed to the shore and beach of the Pacific Ocean in front of that property both before and after November 11, 1889.

3. Repeated court decisions, administrative construction, and legislative action have created a rule of property under state law whereby:

(a) All accretions formed prior to November 11, 1889, belong to the adjoining upland owner;

(b) All accretions formed after November 11, 1889, belong to the State of Washington, subject to the legislative dedication that they constitute a highway to remain forever open to the use of the public, as set forth in Laws of 1901, chapter 110; and

(c) The dividing line between accretions formed before November 11, 1889, and those formed thereafter is the line of ordinary high tide as it existed on that date, is the line which the water impressed upon the soil by covering it for sufficient periods to deprive the soil of vegetation as of that date, and is that line which is set forth in paragraph 1 of the above answer.

Wherefore, the defendant prays that the line of ordinary high tide of November 11, 1889, as described in paragraph 3 (c) of this cross-complaint and as set forth in paragraph 1 of its answer be established

and decreed to be the fixed boundary between the property of the plaintiff and the property of the defendant, and that title to all property westerly of such line be quieted in the defendant State of Washington as against any and all claims of the plaintiff.

JOHN J. O'CONNELL
Attorney General

By HAROLD T. HARTINGER
Assistant Attorney General
Attorneys for Defendant

Office and P. O. Address
Temple of Justice
Olympia, Washington

STATE OF WASHINGTON } ss.
COUNTY OF THURSTON }

DON LEE FRASER, being first duly sworn on oath deposes and says that: He is the duly appointed and acting Deputy Supervisor for the Department of Natural Resources of the State of Washington, and is authorized to make this verification for and on behalf of the defendant; he has read the foregoing Answer and Cross-complaint, knows its contents, and believes the same to be true.

DON LEE FRASER

Subscribed and sworn to before me this 26th day of November, 1962.

MARJORIE B. STONE
Notary Public in and for the
State of Washington, residing
at Olympia

APPENDIX "C"

REPLY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PACIFIC COUNTY

STELLA HUGHES, Plaintiff vs. STATE OF WASHINGTON, Defendant	No. 14546 REPLY AND ANSWER TO CROSS-COMPLAINT

Comes now plaintiff and replying to defendant's answer and answering defendant's cross-complaint admits, denies and alleges as follows:

1.

Admits paragraphs 1 and 2 of the cross-complaint.

2.

Denies paragraph 3 of the cross-complaint.

WHEREFORE plaintiff prays that defendant's cross-complaint be dismissed and that she recover according to the prayer of her complaint.

CHARLES B. WELSH
Attorney for plaintiff

STATE OF WASHINGTON
County of Pacific } ss.

I, Charles B. Welsh, being first duly sworn say: that I am attorney for the plaintiff in the above en-

titled action; that I have read the foregoing reply and answer, know the contents thereof and the same is true as I verily believe. That I make this verification on behalf of plaintiff for the reason that she is without the state of Washington.

CHARLES B. WELSH

Subscribed and sworn to before me this 27th day of November, 1962.

JEAN HOLBROOK

Notary Public in and for the state of Washington residing at South Bend.

APPENDIX "D"

FINDINGS of FACT and CONCLUSIONS of LAW

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PACIFIC COUNTY

STELLA HUGHES, Plaintiff vs. STATE OF WASHINGTON Defendant	No. 14546 FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled matter having come on for trial before the Court on January 23, 1964 and from the record made and the arguments of counsel the court finds the following facts to be true:

1.

That plaintiff individually is the owner in fee simple title and in possession of the following described real property, to-wit:

> Beginning at a point 1353 feet north of the line between Sections 4 and 9, Township 11 N.R. 11 West W.M. and 437.3 feet west from the west line of State Highway No. 12-A, thence north 226.6 feet, thence west 300 feet more or less to the line of mean high tide of the Pacific Ocean, thence South 226.6 feet, thence East 300 feet more or less to beginning.

2.

That title to the above described real property was originally obtained from the United States government prior to 1889 and the Westerly boundary line of said property is a line corresponding to the

line of mean high tide of the Pacific Ocean. That mean high tide of the Pacific Ocean is defined as the average elevation of all high tides as observed at a location through a complete tidal cycle of 18.6 years, and the actual western boundary line of plaintiff's property is where that elevation meets the shore as it exists at any particular time.

3.

That since the original survey and establishment of the meander line by the United States government in 1859 imperceptible accretions have formed in front of the property as hereinabove described, both before and after November 11, 1889, and all of said accretions belong to plaintiff as the upland owner.

4.

That the State of Washington has no right, title, claim or interest in and to said accreted lands or in any part of plaintiff's property lying east of the line of mean high tide as defined herein.

FROM THE FOREGOING FINDINGS OF FACT the court makes the following CONCLUSIONS OF LAW: That plaintiff is entitled to judgment quieting title in her against any claim of the State of Washington in and to her property as hereinabove described lying east of the line of mean high tide of the Pacific Ocean as it now or hereafter may exist.

DONE IN OPEN COURT this 10th day of February, 1964.

/s/ WARNER POYHONEN
Judge

PRESENTED BY
CHARLES B. WELSH
Attorney for plaintiff

APPROVED FOR ENTRY AND
PRESENTATION WAIVED

H. T. HARTINGER
Assistant Attorney General

APPENDIX "E"

JUDGMENT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PACIFIC COUNTY

STELLA HUGHES, Plaintiff	No. 14546
vs.	
STATE OF WASHINGTON Defendant	JUDGMENT

The above entitled action having come on for trial before the Court and the court having entered Findings of Fact and Conclusions of Law:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff individually is the owner in fee simple title and in possession of the following described real property, to-wit:

> Beginning at a point 1353 feet north from the line between Sections 4 and 9, Township 11 N.R. 11 West W.M. and 437.3 feet west from the west line of State Highway No. 12-A, thence north 226.6 feet, thence west 300 feet more or less to the line of mean high tide of the Pacific Ocean, thence South 226.6 feet, thence East 300 feet more or less to beginning.

The Western boundary of which is the line of mean high tide of the Pacific Ocean as it now or hereafter may exist, which line is the average elevation of all high tides as observed at a location through a com-

plete tidal cycle of 18.6 years, free and clear of any right, title, claim or interest of the State of Washington to any lands accreted to the original donation land claim either prior or subsequent to November 11, 1889.

DONE IN OPEN COURT this 10th day of February, 1964.

/s/ WARNER POYHONEN
Judge

PRESENTED BY:
CHARLES B. WELSH
Attorney for plaintiff

APPROVED FOR ENTRY AND PRESENTATION WAIVED:

HAROLD T. HARTINGER
Assistant Attorney General

APPENDIX "F"

STATEMENT OF FACTS

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PACIFIC COUNTY

STELLA HUGHES, Plaintiff	No. 14546
vs.	
STATE OF WASHINGTON, Defendant.	STATEMENT OF FACTS

Before the Honorable Warner Poyhonen, Judge of the Superior Court, Grays Harbor County, sitting as Visiting Judge at South Bend, Pacific County, Washington, January 23, 1964.

APPEARANCE:

For plaintiff, Charles B. Welsh, Attorney at Law, South Bend, Washington.

For defendant, Harold T. Hartinger, Assistant Attorney General, Olympia, Washington.

As Amicus Curiae, Ted Zelasko and Ernest Ingram, Attorneys at law Aberdeen, Washington.

WHEREUPON the following proceedings were had and done, to-wit:

INDEX

EXHIBITS

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COURT'S DECISION Page 6
COURT'S CERTIFICATE Page 13

COURT: Hughes vs. State of Washington. I want to inquire of counsel if they are ready now or do they want me to defer it until 1:30. Whatever they wish. I will do it any way you like. I doubt if you can finish this morning but if you want to start in and plaintiff would like to make his record this morning.

MR. HARTINGER. We have a completely agreed statement of facts and I think we can easily put this in 20 minutes or so and perhaps come back after lunch and defer the argument until 1:30.

COURT: That would be fine.

MR. HARTINGER: Mr. Zelasko and Mr. Ingram are appearing as Amicus Curiae.

COURT: Mr. Welsh, are there any others that are appearing or desire to appear? Have you heard of any?

MR. WELSH: Not to my knowledge. Do you want to proceed—I take it—

MR. HARTINGER: I guess I have the laboring oar all the way through. Just by way of preliminary statement. Mrs. Hughes, the plaintiff, owns property along the Pacific Ocean and she has set forth in her complaint a description of this property as it relates to the area above or landward and it is not in dispute. She claims, in addition, ownership of accreted lands, that is, the land in front of the property she described out to the mean high tide line on the Pacific Ocean. The State has disclaimed any interest in the property that the plaintiff claims lies above—what we will call—the fixed boundary of the 1889 boundary of the tidelands. This case, as I explained to Your Honor the other day in another court, is one case which is being tried of several. I counted the similar cases and I think we have seven. Mr. Welsh can probably verify they have seven other cases that have the same problem that is raised by the State's cross complaint here. In these seven cases we have stipulated as to this issue. The Court's determination here will determine the issue in those seven cases. There are three other cases—the one in Grays Harbor County and two more in this county which have the same issue. We don't have a formal stipulation. Then, of course, several other cases have the same problem. They are not filed yet, but still are on some counsel's desk one way or another. As to the State's—

MR. WELSH: Excuse me counsel. I think we should further define the admitted facts. This is a representative case among many. Each of these cases, as well as the one at present—the original title was acquired by plaintiff or predecessors in interest prior to 1889 from the United States Government.

COURT: Prior to statehood?

MR. WELSH: Prior to statehood.

COURT: As a patent from United States Government?

MR. WELSH: Yes. So that our actual conflict is whether or not the 1889 mean high tide line governs in this case or the mean high tide at any time wherever it may be. We contend it is the latter and the State contends the former. A little bit of clarification here. There are really two problems in this case—one, the accretion problem. The other is the rule for defining the boundary. Whether it is the 1889 boundary or whether it is the present day boundary. Technically, the boundary that the Federal Court used and the one plaintiffs use, is called the line of mean high tide. And when we use that term, we are talking about the technical definition. The State argues the line of vegetation which is a sort of mark on the ground. Those are the two issues actually involved in the thing. The Federal rule does not take

cognizance of the vegetation line title-wise. As far as my reading has progressed, this is a theory used by the engineers of the State of Washington exclusively. It is used customarily by engineers—

COURT. Are you referring to the line of vegetation—

MR. WELSH: Yes. In streams and river, but a vegetation line, title-wise, is a meaningless thing as I understand it from the Federal Rule.

COURT: All right.

MR. HARTINGER: Well, again we are trying this case obviously because we tried this issue in the Federal Court and where the Federal Government was owner of these ocean lands as a trustee for some Indians. In the Federal Court we were attacked on both grounds. The Federal people denied our claim to the land that is formed by accretion since statehood. They likewise argue that this mean high tide line, as used by the U.S. Coast and Geodetic Survey, was the boundary of the tideland. They insisted that the rule that the State has been using—the line of vegetation—is a rule that can be used only for rivers and lakes. Now, as to the factual basis behind the line of vegetation. The State in disposing of its tidelands has used the line of vegetation, but the facts are also that everybody else in the state has been using

it. The Supreme Court has defined it as the boundary line. Our problem on this issue is the accretions. The Court of Appeals has decided the state law must be disregarded and that Federal law, as developed by the Federal Court, must be applied. Basically this is our issue.

COURT: Are you ready to start putting in some evidence.

MR. HARTINGER: What I would like to do—I have talked to counsel about it and he has no objections. We prepared the record by starting with requests for admission of facts. I would like to take these requests, have them marked as an exhibit and then introduce them in this fashion so that counsel and everybody else will have some order to their files. It would save reading to the reporter quite a number of things.

COURT: There are no objections to that?

MR. WELSH: No objections to the procedure if it could be noted that plaintiffs prefer not to make a specific objection to each but simply to the relevancy in toto.

COURT: These will be defendant's exhibits?

MR. HARTINGER: Yes. What we have labeled

Requests for Admission No. 1 is marked Defendant's Exhibit No. 1 for Identification. Request for Admissions of Facts No. 2 has been marked Defendant's Exhibit No. 2 for Identification. Request for Admission of Facts No. 3 has been marked Defendant's Exhibit No. 3 for Identification. Request for Admission of Facts No. 4 has been marked as 4 for Identification. Defendant's 5 for Identification is Request for admission of Facts No. 5. Now, we have one map, which is labeled "Typical Beach Section, Pacific Ocean Beach." Mr. Welsh has agreed that this could come in subject to the same objection to the other. This will be Defendant's 6.

COURT: All right. These may be admitted one through six subject to the objection as to their relevancy.

MR. WELSH: Yes.

MR. HARTINGER: I have one more item and that is the government publication entitled, "Tidal Datum Planes." And the Clerk has marked that Identification 7.

COURT: It may be admitted.

MR. HARTINGER: Then we just have one more fact we wish to orally stipulate to and that is the government survey of the upland adjoining this area was made in 1859.

MR. WELSH: Agreed.

COURT: You want to secure an oral stipulation by counsel that the government survey—

MR. HARTINGER: Of the area in question—

COURT: Of the area in question was made in 1859.

MR. HARTINGER: Yes, Your Honor.

COURT: That stipulation may show for the record.

MR. HARTINGER: All our exhibits are in.

COURT: All that you have offered—there are seven of them.

MR. HARTINGER: That is the record. I would like to hand to Your Honor a trial memorandum. It is quite lengthy and then after the Court has had an opportunity to read it, I would like to explain what the case is about—what our contention is about. Why we make them and argue the matter.

COURT: We may adjourn at this time and give me a little time to read this. Say two o'clock?

MR. HARTINGER: That will be fine.

COURT: For oral argument.

MR. WELSH: That is satisfactory.

COURT: We will be at recess until two.

(Court recessed until 2:00 p.m. and reconvened with all parties present.)

COURT: Court's is session.

(Counsel then proceeded to argue their case after which the Court made his oral decision as follows:)

COURT: I think I would be regarded as rather naive if I failed to appreciate that we are involved in a question in all probability is not going to end here with a decision of the Superior Court of Pacific County. Frankly we are in an area—I don't know as to the circumstances of the parties involved of this particular litigation; an area in which there should be some day at least a final adjudication as to the rights of the people so that we will know where we are for sure and what we own and we don't own; who owns what and who doesn't. With that in view, I expect that about all I am probably doing today is deciding who has to take the initiative of an appeal. This may seem—I am aware of the importance of the problems involved here. This may seem somewhat of a hasty decision in such an important case. I could postpone it by taking the matter under advisement and to delay a month or two or by writing a memorandum opinion on it; I would take the matter under advisement and write a memorandum opinion if I felt there was any real purpose being served in doing

so. I have had some experience with these problems. I never tried one as a lawyer. I represented private clients on two or three occasions with the State of Washington on the other side. The State backed up a little and agreed to sell on rather reasonable terms or give my clients a 99-year lease for a dollar or some such thing that made the lawsuit unnecessary and I never did get to court on the two or three matters which I represented private clients in my lawyer days. As a State legislator in 1947 and 1949, I gave the problem considerable thought. In those days I was quite concerned by reason of the fact some of my constituents out in the Oyehut and Ocean Shores way were quite concerned in getting something accomplished. I gave the matter considerable study. I have had a number of conversations with representatives in the Land Department of the State. One of the Superior Court cases in the exhibit is one of mine out of Grays Harbor County in '58. That is the Sunshine Mining Co. vs. Union Gas Development. I don't know if it is particular in point. I think all I had to do was decide where the line of vegetation had been on a certain date because under state law, title rested on the state permit and it was a factual question and neither party in that litigation was questioning the state's right or title or could they by reason of whatever rights they had, rested on those permits. I watch-

ed with considerable interest the Ocean Shores development. The lawsuit in Minard quiet title action involved several miles of ocean front. That didn't come before me. It was settled. Of course, that Superior Court decision established ownership in the State of Washington. I have never felt it was truly an adversary proceedings. What Minard did — he brought a lawsuit. I think part of the proceedings there was an effort to shut out some squatters out there, who probably had good title by adverse possession if Minard was owner of the property and probably had no rights if the land belonged to the State during all of those years. I don't want to go into the merits except this comment, if Minard owned the property actually, probably it wasn't a bad deal for him. Litigation through the Supreme Court of the United States might have cost him a lot of money. If there wasn't any question about the state's ownership then, then it was state property beyond all question and the propriety of a sale of several miles of beach for $40,000 might be open to question. I will say I have given the matter some little study. I have thought about it from time to time during probably a third of my lifetime. Not continuously but have been aware of it. With that explanation, I hope that the decision won't be regarded as being a hasty one. It is a rather interesting circumstance to me that this

being 1964, it is about 75 years since statehood and that our State Supreme Court would not have been called upon specifically and directly to decide the questions involved here and particularly that question of moving line. It is not in the record—is pure speculation on my part—I have a feeling that what has happened many times and what actually did in two or three of my clients that the State was inclined to back away and so the problem has never been settled by our State Supreme Court. With the result that we have had 74 years of development of a body of State law based on departmental decisions, administrative determination, attorney general's opinions, opinions and decisions of Superior Courts for the most part and a few by our State Supreme Court to kind of get rather close to the question involved here, but doesn't decide it squarely. We have had, as Mr. Hartinger said, a development of a body of of State law or local rule — I guess we can call it a change or modification in common law. They all mean the same thing. We are met with the argument that now we ought not to change that because of the upsetting effect a different decision would have. I don't believe that there is any question that a state may develop its own body of law to change the common law. I think that could be conceded. I don't think anyone would argue very seriously to the con-

trary. Common law can and does change. The problem here is whether—the problem here is a question of jurisdiction. Whether the state law does apply or whether Federal law should be applied. I just don't see any escape from the decision in the Borax Consolidated vs. Los Angeles case in 296 U.S. 10. That is a 1935 case where 28 years ago the opinion was written by Chief Justice Charles Evans Hughes and the Ninth Circuit Court of Appeals decision in United States vs. the State of Washington in 1961, 26 years later, where the decision was written by Justice Hamley, who was formerly a member of the Supreme Court of the State of Washington, that is, the 294 F. (2d) 830 case. I think those cases decide specifically the question that is involved here. The Borax case, now 28 years old, hasn't been departed from that I can find. And the Sampson Johns' case, the Ninth Circuit Court case in '61, was a Federal Case. He was a resident of the state. The State had a lawyer, who for many years felt that the Washington rule—the local law—should be applied. The Circuit Court reversed him and specifically held against the position of the State on both phases of the question. In the Borax case Justice Hughes said—this was quoted in the Sampson John's case—"Petitioners claim under a federal patent which, according to the plat, purported to convey land bordering on the Pa-

cific Ocean. There is no question that the United States was free to convey the upland, and the patent affords no ground for holding that it did not convey all the title that the United States had in the premises. The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law." A number of cases are cited in support of that doctrine. And in that case, of course, the Court in the opinion was the enunciation of the Federal rule—the boundary between tidelands and uplands is the mean high tide line. Such to be determined by the average of 18.6 years. That is the holding of the Supreme Court of the United States which the Circuit Court quoted in the Sampson Johns' case. They went on to follow the holding in the Borax case to the effect that the line is the line of mean high tide of the average elevation as observed at a location through a tidal cycle of 18.6 years. I was personally disappointed that the Supreme Court of the United States denied the certiorari in the Sampson Johns' case. I was hoping they would take jurisdiction and I am aware that no particular inference ought to be

drawn from the fact that they denied certiorari except possibly that if the Circuit Court of Appeals had departed from the rule announced in Borax and had held in favor of the State of Washington rather than in favor of the Federal Government, I just can't help but feel the Supreme Court of this nation would have wasted no time in granting the certiorari and taking another look at the problem. Now, whether these decisions are right, whether the court was right in the Borax Case and again in the Sampson Johns' Case, that's what it did and is something that I can't be concerned with. All I'm saying is it seems to me they did say it. I feel I am bound by it. I can't do very much more about it. There are people understandably who would not be happy with the rule. I think the opinion of Judge Chambers in the Circuit Court case is worth reading. It is a short paragraph and may express the feelings of a great many of us. Judge Chambers said, "As a District Court thought, I think that the question of the line of title ought to be decided by state law, but as I read Borax Consolidated Ltd. vs. Los Angeles, 296 U.S. 10, I think the road sign points to the line being treated as a Federal question, as I concur." He is bowing to the inevitable. That is just the feeling I have. I know that nobody has ever worked harder on this case or cases involving this question than Mr. Hartinger.

He has put a great part of his lifetime into it and it looks like he is going to spend some more. If he can persuade the Federal Court and the Supreme Court of the United States to take another look at it, more power to him. I am going to grant the plaintiff's judgment on both issues—as to the title to the accretion and as to the line.

MR. HARTINGER: I don't propose to call Your Honor back. It is just as easy to go over to Montesano and I would like to stipulate that the judgment may be signed by Your Honor in Montesano.

MR. WELSH: Certainly.

COURT: I have that right anyway.

STATE OF WASHINGTON
County of Pacific } ss.

I, WARNER POYHONEN, one of the Judges of the Superior Court of the State of Washington and the Judge before whom the above-entitled cause was tried, do hereby certify:

That the matters and proceedings embodied in the foregoing Statement of Facts are matters and proceedings occurring at the trial of said cause, and is hereby made a part of the record herein.

I do further certify that the same contains all

the material facts, matters and proceedings heretofore appearing in said cause and not already a part of the record herein.

I do further certify that 7 exhibits, marked Defendant's Exhibits 1 through 7, hereto attached, are all the exhibits admitted in evidence upon the trial of said cause.

DONE IN OPEN COURT this 10th day of April, 1964.

/s/ WARNER POYHONEN
JUDGE

APPENDIX "G"

APPELLANT'S BRIEF

In the Supreme Court of the State of Washington

STELLA HUGHES,
Respondent,
vs.
STATE OF WASHINGTON
Appellant,
No. 37583

APPEAL FROM THE SUPERIOR COURT
OF PACIFIC COUNTY

Honorable Warner Poyhonen, Judge

BRIEF OF APPELLANT

JOHN J. O'CONNELL,
Attorney General

HAROLD T. HARTINGER,
Assistant Attorney General

LAUREL L. TILLER,
Assistant Attorney General

ATTORNEYS FOR APPELLANT

Office & Post Office Address: Temple of Justice, Olympia, Wn.

PLEADINGS AND PROCEEDINGS

Mrs. Hughes' complaint[11] sets forth her claim against the state as one to establish and quiet title to real property. She described the outer boundary of her property as the present line of "mean high tide" of the Pacific Ocean.[12]

The state served and filed an answer and cross-complaint.[13] The state alleged that at the location in question accretions had formed to the shore and beach of the Pacific Ocean both before and after the date of statehood (November 11, 1889). The state disclaimed any interest in the accreted lands formed prior to statehood, but contended that all lands thereafter formed constituted a portion of the public highway dedicated and reserved for the people by the legislature. The inner boundary of the public beach and shore, according to the state's theory, was the line of ordinary high tide of November 11, 1889, defined as

> the line which the water impressed on the soil by covering it for sufficient periods to deprive the soil of vegetation as of that date.

The state specifically alleged that its claimed

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[11] Tr. 1-2.

[12] See the prayer of the complaint which amplifies the description of the property set forth in the complaint's first paragraph.

[13] Tr. 4-6.

location of the inner boundary of the public beach area was based upon a state rule of property that had its origin in state court decisions, legislative action, and administrative construction of legislative action.

Mrs. Hughes' reply and answer to cross-complaint[14] disputed only the state's contention that a local rule of property had been established, her position at all times being that any state law was immaterial because federal judge-made law was controlling.[15]

At the time of trial there were no disputed questions of fact for the court to decide.[16] All evidence, by agreement, was submitted in documentary form. Seven items of written materials were introduced as exhibits.

After hearing argument of counsel, the trial judge made his oral ruling.[17] The judge preferred state law[18] but nevertheless felt compelled by the federal court decisions in Borax, Ltd. v. Los. Angeles[19] and United States v. Washington[20] to establish the dis-

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[14] Tr. 7.
[15] St. 3, 5.
[16] St. 5-6.
[17] St. 6-12.
[18] St. 11.
[19] 296 U.S. 10 (1935).
[20] 294 F. 2d 830 (9th Cir. 1961)

puted boundary solely as a matter of federal judge-made law.[21]

Findings of fact, conclusions of law,[22] and judgment[23] were entered in accordance with the court's oral decision. The state thereafter gave timely notice of appeal[24] to bring the litigation before this court for review..

TITLE TO ACCRETED LANDS

Acquisition of Private Title to Accreted Tidelands Is a Matter of State Law

Under common law, when publicly owned tidelands are slowly and imperceptibly built up by a deposit of ocean sands, the public is divested of title to the tidelands and title is acquired by the private riparian owner. By our first assignment of error we assert that the State of Washington can and did change this common law rule. We maintain that state law can modify the common law so that the gradual build-up of tidelands works no change in ownership, and we contend that the 1901 enactments did just this to those portions of the ocean shore and beach in Pacific and Grays Harbor counties which were dedicated to the perpetual use of the public.

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[21] St. 11-2.
[22] Tr. 8-9.
[23] Tr. 10-1.
[24] Tr. 12.

Mrs. Hughes challenges the power of the state to make a change in the common law accretion rule. She holds that change, if it be made, must come from the federal government. (She does not suggest, of course, that the common law rule is unchangeable.)

This challenge to the efficacy of state law over state tidelands is the first matter we here explore.

I

Under our federal system of government, sovereignty is divided between state and nation[3]. At an early date it was decided that ownership of lands underlying navigable waters was an incident of that sovereignty which belonged to the original thirteen states rather than to the national government.[4] Thus ownership of tidelands was an incident of the original states' inherent sovereignty.

The State of Washington, when it was admitted to the Union, was admitted on an equal footing with the original thirteen states.[5] Neither the federal government nor the then existing states had the power to deny to this state full rights of sovereignty

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[3] U. S. Const., Tenth Amendment.

[4] Pollard's Lessee v. Hagan, 3 How. (44 U.S.) 212, 230 (1845); United States v. Louisiana, 363 U.S. 1, 16 (1960).

[5] State v. McCoy, 63 Wash. Dec. 2d 423, 439, 387 P. 2d 942 (1963).

because the power to admit new states to the Union[6] meant.[7]

> a union of states, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself.

The State of Washington, by its constitution, asserted its full rights to lands underlying navigable waters.[8] The state therefore has the same rights as the original thirteen states in controlling the rights and incidents in these lands.[9] When a riparian owner acquires title by imperceptible accretions to the sovereign's lands, it therefore follows that it is acquisition of title under state law, not federal law.[10] Likewise, state law determines whether the riparian owner will acquire title to additional land created by a

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[6] U. S. Const., Art. 4, § 3.

[7] Coyle v. Oklahoma, 221 U.S. 559, 567 (1911).

[8] Wash. Const., Art. XVII, § 1:

> The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: * * *

[9] Eisenbach v. Hatfield, 2 Wash. 236, 26 Pac. 539 (1891); Barney v. Keokuk, 94 U.S. 324, 338 (1876); Shively v. Bowlby, 152 U.S. 1, 40 (1894); Hardin v. Jordan, 140 U.S. 371, 382 (1891); Port of Seattle v. Oregon & Washington R. Co., 255 U.S. 56, 63 (1921); McGilvra v. Ross, 215 U.S. 70, 79 (1909); Mann v. Tacoma Land Co., 153 U.S. 273, 283-4 (1894).

[10] Joy v. St. Louis, 201 U.S. 332, 342 (1906); St. Louis v. Rutz, 138 U.S. 226, 250 (1891).

sudden deposit of soil[11] or by the deposit of soil caused by an act of man.[12]

It is a rare occurrence, of course, when a state denies a riparian owner title to tidelands that have become fast lands by slow and imperceptible accretion, but at least two other states have done so. Louisiana, for example, chose to retain title to accretions formed on the sea or an arm of the sea[13] in accordance with prior Spanish law.[14] But California, another example, expressly modified its common law moving boundary rule by statute. The validity of the statute was upheld by the federal court of appeals[15] in an opinion which well expresses our position here:

> (T)he decision in Shively v. Bowlby, 152 U.S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331, sustains the power of a state to cut off, without compensation, the right of a riparian proprietor to future accretion. We know of no decision in which this doctrine has been questioned. If it is within the power of the state to thus appropriate and improve tide-land or submerged land in front of a riparian proprietor, and thus deprive him of the right of future accretion, what tenable

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[11] Barney v. Keokuk, 94 U.S. 324, 337 (1876).

[12] Barney v. Keokuk, supra; Annotation: Glenn, "Rights to land created at water's edge by filling or dredging," 91 A.L.R. 2d 857-88 (1963).

[13] Zeller v. Yacht Club, 34 La. Ann. 837 (1882) (only proprietors on rivers and streams could acquire title by accretion).

[14] Ker v. Couden, 223 U.S. 268, 278 (1911).

[15] Western Pac. Ry. v. Southern Pac. Co., 151 Fed. 376, 399-400 (9th Cir. 1907).

ground is there for saying that the state may not by statute accomplish the same result, and for holding that the state of California by its statute of 1872 could not lawfully make provision, as it did, that the limits of lands owned by riparian proprietors of bays and arms of the sea could not be extended over the lands then held in trust for the public by virtue of any accretion that might thereafter be deposited thereon?[16]

II

The federal court of appeals, in United States v. Washington,[17] conceded that all we have said above is true, provided only that title to the uplands abutting the state's tidelands is not in the United States nor derived from it. We do not reach the first issue (abutting title in the United States) in this case because the government parted with its title by a pre-statehood patent.[18]

We do reach the second issue (abutting title derived from the United States) because Washington is a public lands state, i.e., one wherein all land titles originate from the United States.

In our view, the court of appeals misread the opinions of the United States supreme court. There

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[16] 151 Fed. at 400.

[17] 294 F. 2d 830 (9th Cir. 1961).

[18] Needless to say, we do not agree with the court of appeals on this issue. The government's rights over its own property, whatever they may be, should not be permitted to override sovereign rights of the state over its property.

is absolutely no basis to limit a state's right to modify the common law solely on the ground that private title had its inception from the United States rather than some other sovereign. When the government issues its patent there is no principle of federal law that raises the common law incidents of real property ownership to the status of immutable attributes of the title acquired, forever freed from the possibility of change by the state. It is just not so.

Two illustrations immediately come to mind to demonstrate our point. Prior to 1961 and Initiative Measure No. 208,[19] this state did not recognize joint tenancies in real property. Even now the incidents of joint tenancy are not necessarily the same as the common law incidents.[20] Similarly, this state has never recognized the common law incidents of real property ownership by husband and wife. This state, instead, adopted the community property concept from the Spanish law.[21]

It cannot be seriously argued that these laws, being changes in the common law, are not operative simply because all real estate in Washington was once owned by the federal government. They, like

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[19] Laws of 1961, chapter 2; chapter 64.28 RCW.

[20] See, e.g.., Griffith, Joint Tenancy and Community Property, 37 Wash. L. Rev. 30-43 (1962).

[21] Chapter 26.16 RCW.

any number of other changes in the common law of real property, are nothing more than an exercise by the state of its inherent power to enact law.

To move closer to the issue at hand, we can say that this state's right to modify the common law incidents of riparian ownership cannot be doubted either, even though the real property comes originally from the government and borders navigable water or concerns rights closely connected with navigation. We can see this clearly when we look at the matter of riparian rights generally.

From the earliest days of statehood, Washington has expressly denied the existence of all riparian rights on navigable waters.[22] Mr. Justice Brandeis even noted this fact for the United States supreme court.[23] This fact was also acknowledged by an early commentator on riparian rights in the west coast states.[24] As this commentator predicted,[25] it is now a rule of property in this state that land adjoining navigable water has no riparian rights.[26]

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[22] Eisenbach v. Hatfield, 2 Wash. 236, 26 Pac. 539 (1891).

[23] Port of Seattle v. Oregon & Washington R. Co., 255 U.S. 56, 64 et seq. (1921).

[24] Black's Pomeroy on Water Rights 534 (1893).

[25] Id. at 540.

[26] Only recently this court denied the existence of riparian rights. Grill v. Meydenbauer Bay Yacht Club, 61 Wn. 2d 432, 435, 378 P. 2d 423 (1963). Prior cases so holding are numerous. E. g., State v. Sturtevant, 76 Wash. 158, 163, 135 Pac. 1035 (1913), and cases cited; Brace & Hergert Mill Co. v. State, 49 Wash. 326, 331, 95 Pac. 278 (1908), and cases cited.

In denying the existence of riparian rights, this court was well aware that title to all land within the state was once in the United States, for it specifically denied that this fact was an infirmity in the state doctrine.[27] The federal cases[28] cited by the court would, indeed, be inexplicable if the principles announced in the cases were to be disregarded simply because Washington is a public lands state. Of course this is not what the United States supreme court meant. In a later case it specifically rejected this argument, saying:[29]

> It does not impair the efficacy of the grant or the use and enjoyment of the property by the grantee to hold that riparian rights are to be decided by the state courts, inasmuch as the grant, if by the Federal Government, has been held in the cases already cited, not to include title over navigable waters within or bounded by the States.

III

Contrary to the assumption of the court of appeals, Borax, Ltd., v. Los Angeles[30] does not prohibit state modification of the common law accretion rules

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[27] Brace & Hergert Mill Co. v. State, 49 Wash. 326, 333, 95 Pac. 278 (1908).

[28] Barney v. Keokuk, 94 U.S. 324 (1876); Packer v. Bird, 137 U.S. 661 (1891); St. Louis v. Rutz, 138 U.S. 226 (1891); Hardin v. Jordan, 140 U.S. 371 (1891); Shively v. Bowlby, 152 U.S. 1 (1894).

[29] St. Anthony Falls Water Power Co. v. Water Comm'rs, 168 U.S. 349, 363 (1897).

[30] 296 U.S. 10 (1935).

where adjoining upland title is derived from the United States. Borax was not an accretion case (it involved no accreted lands) nor did it decide any matter of riparian rights generally.

In Borax the court intended to define the territorial limits of the tidelands which a state might claim as an incident of its sovereignty. However, once a state's claim had fastened upon particular lands, the court had no intention of limiting state jurisdiction over the property rights and interests in the lands. Specifically, the court did not imply that a state must surrender its tidelands to an upland owner under the common law accretion doctrine. On the contrary, the court left the matter of surrender entirely to the state. It said:[31]

> Rights and interests in the tidelands, which is subject to the sovereignty of the State, are matters of local law. Barney v. Keokuk, 94 U.S. 324, 338; Shively v. Bowlby, (152 U.S. 1), p. 40; Hardin v. Jordan, 140 U.S. 371, 382; Port of Seattle v. Oregon & Washington R. Co., 255 U.S. 56, 63.

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[31] 296 U.S. at 22.

APPENDIX "H"

In the Supreme Court of the State of Washington

STELLA HUGHES,
Respondent,

vs.

STATE OF WASHINGTON,
Appellant.

No. 37583

Appeal from the Superior Court of Pacific County Honorable Warner Poyhonen, Judge

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BRIEF OF RESPONDENT

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ARGUMENT IN SUPPORT OF JUDGMENT

The lower court was impelled to follow the decisions in Borax Consolidated Ltd. vs. Los Angeles, 296 U.S. 10 (1935) and the U. S. vs. State of Washington, 294 Fed. 2d 830, (9th Circuit 1961) Certiorari denied. (St. 9, 10). The opinion in this latter case was written by Judge Hamley, a former member of this state's supreme court who on page 2 of his opinion said:

> "Declining to be bound in its determination by the definition of the term "ordinary high water mark" under California law, the Court said:
>
> > "The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law. Packer vs. Bird, 137 U.S. 661, 669, 670; Brewer-Elliott Oil Co. v. United States, 260 U.S. 77, 87; United States v. Holt Bank, 270 U.S. 49, 55, 56; United States v. Utah, 283 U.S. 64, 75. Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law. Barney v. Keokuk, 94 U.S. 324, 338; Shively v. Bowlby, supra (152 U.S. 1) p. 40; Hardin v. Jordan, 140 U.S. 371, 382; Port of Seattle v. Oregon & Washington R. Co., 255 U.S. 56, 63",. 296 U.S. at 22".

The court went on to state that while no question of accretions was involved in the Borax case:

"The principle there announced is equally applicable where the problem is one of determining whether imperceptible accretions go with the upland. If the upland owner is entitled to the imperceptible accretions it is because this is an attribute of title reserved to or obtained by grant from the Government. Thus the determination of the attributes of an underlying federal title, quite as much as the determination of the boundaries of the land reserved or acquired under such title, "Involves the ascertainment of the essential basis of a right asserted under federal law."

having thus concluded the court further stated on page 5:

"The common law is the source of tideland title which the United States held and which passed to the State of Washington when it was admitted to the Union. Federal law follows the common law in determining the measure of the title to lands retained by the United States. The Supreme Court has implicitly so recognized.[5]

At common law the person whose land is bounded by sea, lake or river owns any additions thereto resulting from imperceptible accretion."

"Shively v. Bowlby, supra 5, 152 U.S. at 35; Jeffris v. East Omaha Land Co., supra, 134 U.S. at 189; Barney v. Keokuk, supra, 94 U.S. at 337; County of St. Clair v. Lovingston, supra, 90 U.S. (23 Wall.) at 68; Jones v. Johnston, 59 U.S. (18 How.) 150, 156; New Orleans v. United States, 35 U.S. (10 Pet.) 662, 717."

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[5] See Borax Consolidated, Ltd. v. Los Angeles, supra, 296 U.S. at 22-23; Jefferis v. East Omaha Land Co. 134 U.S. 178, 189, 194-97; Barney v. Keokuk, 94 U.S. 324; County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46, 68-69.

Further on page 6 the court said:

> "In case of tidal waters such as are involved here, the high water mark means the line of high water as determined by the course of the tides, not as determined by the physical markings made upon the ground by the water.——the definition of mean high tide is the average elevation of all high tides as observed at a location through a complete tidal cycle of 18.6 years." (Borax case supra.)
>
> "This is an unchanging elevation and the line of mean high tide is where that unchanging elevation meets the shore as it exists at any particular time."

Finally, this decision settled, and we think permanently, the title to and extent of a patentee's title and the method of determining the water boundary thereof.

Since the U. S. Coast and Geodetic Survey has made a determination of all of these tidal cycles or datum planes, it is a simple matter to determine the line of mean high tide not only at any place but at any time, both presently and in the past; and as the upland changes in height the upland owner loses or gains. The lower court well stated it has taken seventy-five years to arrive at a definitive conclusion but that time has now arrived. (St. 9)

APPENDIX "1"

In the Supreme Court of the State of Washington

STELLA HUGHES,
Respondent,

vs.

STATE OF WASHINGTON
Appellant

No. 37583

APPEAL FROM THE SUPERIOR COURT
OF PACIFIC COUNTY
HONORABLE WARNER POYHONEN, JUDGE

Reply Brief of Appellant

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III

BORAX, LTD. V. LOS ANGELES AND UNITED STATES V. WASHINGTON DO NOT NULLIFY STATE REAL PROPERTY LAW

Mrs. Hughes contends that this court is compelled to affirm the judgment of the court below on authority of Borax, Ltd. v. Los Angeles[7] and United States v. Washington[8] without regard to state law, be it statute or judicial decision.[9]

The state disputes this contention.

First, as to the common law rule of accretions, neither case precludes state change of the rule which affects title to accreted land formed after the United States has parted with title to the adjoining uplands. Borax, on the one hand, did not involve accreted lands and it did not involve any change in the common law. United States v. Washington, on the other hand, did involve these issues, but holds only that a change in state law may not be applied against the federal government and its property.

There is absolutely no basis under our federal system for limiting a state's right to modify the common law solely on the ground that it pertains

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[7] 296 U.S. 10 (1935).
[8] 294 F. 2d. 830 (9th Cir. 1961).
[9] "Argument in Support of Judgment," Brief of Respondent, pp. 10-13.

to real property, title to which can be traced to the United States rather than to some other sovereign. This state, for example, may abolish joint tenancies or it may adopt community property laws. Both are changes in the common law, yet both are valid changes even though they affect title to real estate once owned by the United States. We believe the changes in common law riparian rights, including the rights to accretions are equally within the competence of the state.[10]

Secondly, as to the definition of "ordinary high tide" neither Borax nor United States v. Washington invalidates this court's decision in Harkins v. Del Pozzi[11] upon which we rely.

United States v. Washington involved property of the United States, not property to which the government had parted title prior to Washington statehood, as is the case here.

In Borax the California legislature had granted to the City of Los Angeles, by statute, certain tidelands "below the line of mean high tide of the Pacific Ocean."[12] The Borax Company, as adjoining upland owner, sought to limit the tidelands to the line of

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[10] Brief of Appellant, pp. 33-43.
[11] 50 Wn. 2d 237, 310 P. 2d 532 (1957).
[12] 296 U.S. at 12.

the "neap tides."[13] which it deemed the equivalent[14] (as the court did also)[15] of the physical markings on the ground. The court ruled that the city could claim beyond the line of the neap tide (the physical markings on the ground) to the line of mean high tide, as provided by the California statute. The court did not say that a state's tideland ended before the line of vegetation is reached.

There is every reason to uphold the validity of the line of vegetation rule of Harkins v. Del Pozzi: (1) it is an interpretation of a provision of our state constitution[16] (2) which adopts the same rule for dividing tidelands from uplands as has been announced in the past for dividing lake bed[17] and river bed[18] from uplands; (3) it continued as state law the federal rules on this subject as they existed at the time Washington became a state.[19] Insofar as there may be a federal interest in the matter,[20] Congress

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[13] 296 U.S. at 15, 22.
[14] See summary of its brief, 80 L. Ed. at 10.
[15] See Court's comments, 296 U.S. at 22.
[16] Art. 17, § 1.
[17] Austin v. Bellingham, 69 Wash. 677, 680-81, 126 Pac. 59 (1912).
[18] Washougal Transp. Co. v. Dalles, Etc., Nav. Co., 27 Wash. 490, 497, 68 Pac. 74 (1902).
[19] San Francisco v. LeRoy, 138 U.S. 656, 671-72 (1891); Shively v. Bowlby, 152 U.S. 1 (1894).
[20] See, Miskin, The Variousness of "Federal Law:" Competence and Discretion in the Choice of National and State Rules for Decision, 105 U. Pa. L. Rev. 797 (1957).

has spoken,[21] and this court's determination of the common law is controlling.[22]

IV

COMMON LAW ON TITLE TO ACCRETIONS MAY BE CHANGED BY STATE LAW

Mrs. Hughes makes only one answer[23] to the state's argument[24] that the common law rule on title to accretions may be changed by state law. Her answer is that the court of appeals, in the United States v. Washington,[25] refused to permit state changes to affect uplands owned by the United States. But Mrs. Hughes' property has not been government owned at any time since statehood and that case hardly helps her position here.

Not one of the remaining cases[26] cited by Mrs. Hughes supports a power in Congress (or in the federal courts) to change the common law rule. These cases uphold state jurisdiction.

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[21] Rules of Decision Act, 28 U.S.C. § 1652 (1958): The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require and provide, shall be regarded as rules of decision in civil actions in courts of the United States, in cases where they apply.

[22] Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[23] Brief of Respondent, pp. 14-18.

[24] Brief of Appellant, pp. 32-43.

[25] 294 F2d 830 (9th Cir. 1961)

[26] Barney v. Keokuk, 94 U.S. 324 (1876); Shively v. Bowlby, 152 U.S. 1 (1894); Hardin v. Jordan, 140 U.S. 371 (1891); Port of Seattle v. Oregon & Washington R.R., 255 U.S. 56 (1921); McGilvra v. Ross, 215 U.S. 70 (1909); Mann v. Tacoma Land Co., 153 U.S. 273 (1894); Eisenbach v. Hatfield, 2 Wash. 236, 26 Pac. 539 (1891).

APPENDIX "J"

SUPREME COURT DECISION

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STELLA HUGHES, Respondent, v. STATE OF WASHINGTON, Appellant.	No. 37583 EN BANC Filed January 20, 1966

WEAVER, J.—The question of law generated by this appeal spring from Article 17 of the state constitution, its historical background, and it iterpretation, legislative, administrative, and judicial.

Article XVII—TIDE LANDS

§1 DECLARATION OF STATE OWNERSHIP. The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: Provided, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state.

§2 DISCLAIMER OF CERTAIN LANDS. The state of Washington disclaims all title in and claim to all tide, swamp and overflowed lands, patented by the United States: Provided, the same is not impeached for fraud.

Plaintiff, Stella Hughes, is the owner of an upland tract of land on the Long Beach Peninsula near Ocean Park, Pacific County, Washington. Title is deraigned from a patent issued prior to statehood. In this action to quiet title plaintiff alleges[1] that the west boundary of the tract is described as

> the line of ordinary high tide of the Pacific Ocean.

She prays that the court establish the westerly boundary of her property to be "the line of mean high tide of the Pacific Ocean." No time for the determination is indicated.

The trial court found that since the original survey and establishment of the meander line by the United States government in 1859, imperceptible accretions have formed in front of plaintiff's property, both before and after November 11, 1889, and that all the accretion belongs to plaintiff as upland owner. The state does not claim the accretion prior to 1889, the date of its admission to the union. It contends, however, that the present western boundary

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[1] Plaintiff alleges ownership of the following described property: Beginning at a point 1353 feet north from the line between Sections 4 and 9, Township 11 N. R. 11 West W.M. and 437.3 feet west from the west line of State Highway No. 12-A, thence north 226.6 feet, thence west 300 feet more or less to the line of ordinary high tide of the Pacific Ocean, thence South 226.6 feet, thence East 300 feet more or less to beginning.

of plaintiff's land and the present eastern boundary of the state's tidelands is the line of "ordinary high tide" as it existed November 11, 1889. In its answer and cross-complaint, the state alleges that this line on November 11, 1889 was described as follows:

> Beginning at a point whose Y coordinate is 436,139.17 and whose X coordinate is 1,104,683.64, referred to the Washington Coordinate System, South Zone, and running thence on an azimuth of 1°14'05" 3412.79 feet to a point whose Y coordinate is 432,727.18 and whose X coordinate is 1,104,610.10, referred to said coordinate system.

The state appeals from a judgment dated February 10, 1964, which determines:

> that the western boundary of the foregoing property [of plaintiff] is the line of mean high tide of the Pacific Ocean as it now or hereafter may exist, which line is the average elevation of all high tides as observed at a location in front of the property through a complete tidal cycle of 18.6 years.

We point to the possible difference between "ordinary high tide," as set forth in the constitution, and "mean high tide as it now (February 10, 1964) or hereafter may exist," as determined by the trial court. We also point out that the superior court determined a possible changing or shifting western boundary for plaintiff's property.

This appeal brings into sharp focus the following

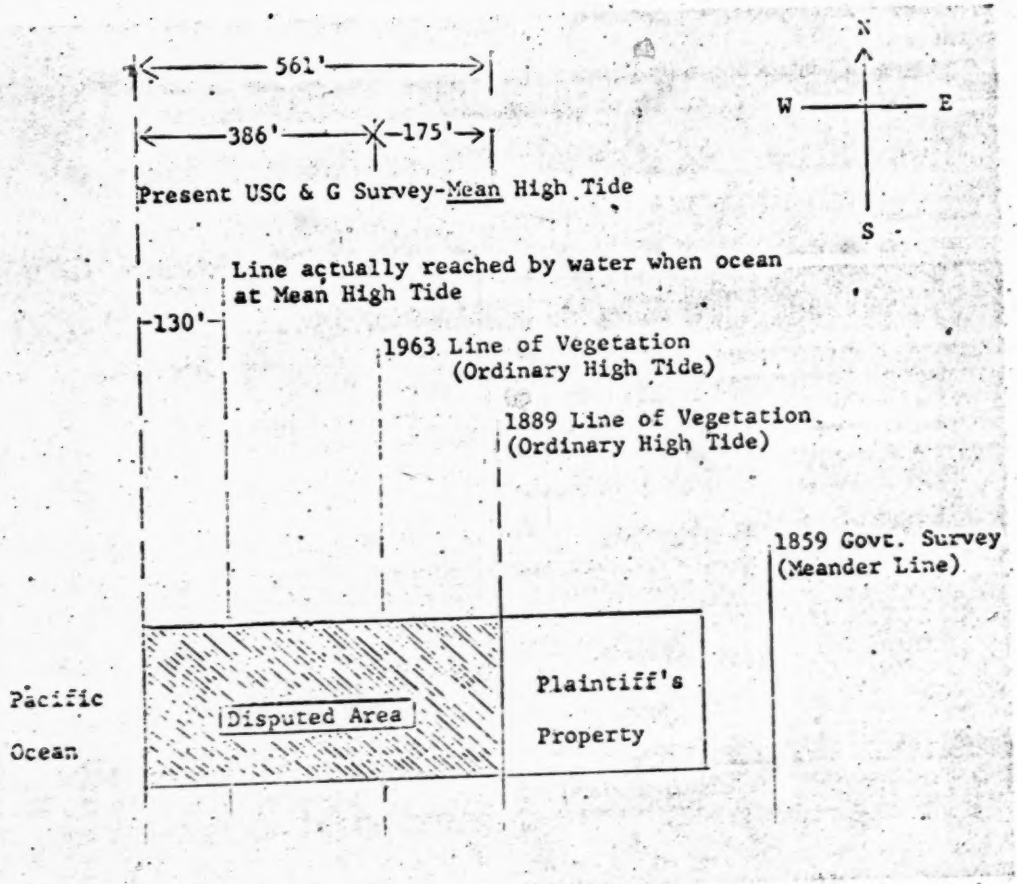
questions: (a) When did title to the tidelands vest in the State of Washington? (b) What is the nature of the State's ownership? (c) What is the extent of the State's ownership? i.e., what is the dividing line between the upland property and the state-owned tideland? (We are not concerned with the seaward line in the instant case. See the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315 (1958 ed.). (d) Is the dividing line a fixed line or is it a changing line depending upon accretion or reliction? (e) If a fixed line, as of what date should it be established? The trial court said in its oral opinion:

> It is rather interesting circumstance to me that this being 1964, it is about 75 years since statehood and that our State Supreme Court would not have been called upon specifically and directly to decide the questions involved here and particularly that question of moving line."

Undoubtedly there are other questions that might arise, but we deem the foregoing sufficient to present the issue of the instant case.

For the sake of clarity and in order to illustrate the facts we set forth the following sketch, prepared by the court from exhibits in the record. It is not drawn to scale

(MAP) (See next page).


561'
386'
175'
N
W
E
S
Present USC & G Survey-Mean High Tide
Line actually reached by water when ocean at Mean High Tide
130'
1963 Line of Vegetation (Ordinary High Tide)
1889 Line of Vegetation (Ordinary High Tide)
1859 Govt. Survey (Meander Line)
Pacific Ocean
Disputed Area
Plaintiff's Property

History of Constitutional Provision

The questions presented by the instant case are not new. As early as 1854 the territorial legislature granted owners of property abutting navigable waters the right to build wharves, under certain conditions, and to "extend them so far into said waters or water courses as the convenience of shipping may require," and to maintain them for not more than 20 years.[2]

On numerous occasions the territorial legislature memorialized Congress to grant tidelands to the territory so that they might be sold and the funds used for internal improvements,[3] or to grant them to certain towns and cities to aid in their development.[4] In 1873 the territorial legislature passed an act confirming the title of the Seattle and Walla Walla Railroad and Transportation Company to the tidelands south of King Street in Seattle and around Elliot Bay "from extreme high to extreme low tide, and to deep water . . . derived by deed from the city of Seattle to the said company dated August 19, 1873," provided the first section of 15 miles of railroad be constructed within three years. The territory purported to convey such title "as would otherwise be-

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[2] Laws of Washington Territory 1854, p. 377
[3] Laws of Washintgon Territory 1869, p. 527
[4] Laws of Washington Territory 1859, p. 500 (Olympia)
Laws of Washington Territory 1871, p. 220 (Olympia)
Laws of Washington Territory 1871, p. 213 (Seattle)

long to and vest in the state, upon the admission of Washington Territory into the Federal Union as a state."[5]

One cannot read the record of the proceedings of the state constitutional convention[6] and the newspaper and editorial comment published during the convention (Yelle v. Bishop, 55 Wn.2d 286, 292, 347 P.2d 1081 (1959)), between July 4 and August 22, 1889, without concluding, as do the historians of that period,[7] that the most vexing and politically sensitive problem confronting the convention was that of harbors, and the control, use, ownership, and disposal of the tidelands of the new state to be. No other problem was of more vital concern to the economic development of the state, for the tidelands in front of Seattle and other cities on Puget Sound and the ocean were of tremendous value.

During the convention suggested constitutional proposals ranged from a declaration of inalienable state ownership of tidelands with limited leasing privileges, to no declaration at all, thus leaving all questions of tideland ownership and use to the whim of

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[5]Laws of Washington Territory 1873, p. 577

[6]The Journal of the Washington State Constitutional Convention, 1889, p. 809 et seq. (Book Publishing Co. 1962).

[7]See Nesbit, "He Built Seattle" p: 308 et seq. (University of Washington Press, 1961). This is a biography of Thomas Burke, Chief Justice of the Territorial Supreme Court, 1888-89.

future legislatures. The major source of difference arose from whether the state, the cities, or private individuals and corporations should control the water front. Generally, five groups brought pressure to bear upon the 75 members of the convention: (1) the owners of upland property; (2) the occupiers or preemptors of tidelands who had placed improvements thereon; (3) land speculators; (4) cities and towns; and (5) the railroads. The conflict of interests was sharp and the debates reported were acrimonious.

It was not until August 22, 1889, the final day of the convention, that Article 17 (quoted supra) was adopted.[8] The article is, in truth, a Janus-like compromise of the contentions of the various schools of thought in the constitutional convention. Although it asserts state ownership of tidelands and disclaims all right to tidelands theretofore patented by the United States, it makes no declaration of policy to govern the use or disposition of such lands. The convention left the use and sale of state-owned tidelands to the politics of future legislatures and to the interpretation to be given Article 17 by the Supreme Court.

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[8]Austin Mires (a member of the constitutional convention), "Remarks on the Constitution of the State of Washington," The Washington Historical Quarterly, Vol. 22, No. 4, Oct 1931, p. 276.

Before discussing our decisional law, it is necessary to review briefly the tideland statutes subsequent to statehood, the definition of "the line of ordinary high tide," and the administrative and superior court interpretations of the statutes.

Tideland Statutes Subsequent to Statehood in 1889

Since Article 17 was a compromise of the various interests represented in the constitutional convention, it is not surprising to find tideland politics carried forward into subsequent legislative sessions.

The early statutes provide for the survey, classification, and appraisal of state-owned tidelands[9] and set forth the method and manner of sale or lease thereof. Oyster beds were "withdrawn and reserved from sale or lease for the purpose of establishing a natural oyster bed reserve."[10] A railroad was granted the right to maintain tracks and wharves on tidelands.[11] Although abutting property owners were given a preferential right to purchase tidelands, one having placed improvements thereon prior to March 26, 1890 had the exclusive right to purchase if used for "commerce, trade, residence, or business."[12] Laws

[9]Laws of 1889-90, p. 431 731; Laws of 1891, p. 403; Laws of 1893, ch. 17, p. 26; ch. 49, p. 241.
[10]Laws of 1891, p. 366.
[11]Laws of 1897, ch. 88, p. 228.
[12]Laws of 1897, ch. 89, § 45, p. 250.

of 1899, ch. 83, § 1, p. 132[13] was the first legislative recognition of accretion to tidelands. The statute provided:

> That any accretions that may be added to any tract or tracts of tide or shore lands heretofore sold or that may hereafter be sold by the state shall belong to the state, ...

[1] The statute treats with accretion to tidelands "heretofore sold or that may hereafter be sold" by the state. The accretion belongs to the state. The statute does not purport to determine ownership of accretion when the tidelands have not been sold. See Strand v. State, 16 Wn.2d 107,129,132 P.2d 1011 (1943). We do not construe the statute in any sense to be a waiver by the state of its interest in tidelands. It is more logical to conclude that this is a legislative recognition of the state's claim to all accretion after 1889 whether the tidelands be sold or not. The statute is at least indicative of the legislative intent to claim accretion for the state under the limited circumstances identified.

It was not until Laws of 1901, chapter 105, p. 217, and ch. 110, p. 225, that the public's interest in

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[13]Laws of 1899, ch. 83, § 1, amending Laws of 1897, ch. 89, § 51; reenacted by Laws of 1927, ch. 255, § 123; now codified as RCW 79.01.492. The reenactment made a few minor changes in the 1899 wording. See Ghione v. State, 26 Wn.2d 635, 650, 175 P.2d 955 (1946) for the changes.

tide and shoreland received legislative recognition. Sections 1 and 2, chapter 110 (RCW 79.16.170, 171) provide:

> That the shore and beach of the Pacific Ocean, including the area or space lying, abutting or fronting on said ocean and between ordinary high tide and extreme low tide (as such shore and beach now are or hereafter may be) from the Columbia river or Cape Disappointment on the south to a point three hundred feet southerly from the south line of the government jetty on Peterson's Point, State of Washington on the north, be and the same are hereby declared a public highway forever, and as such highway shall remain forever open to the use of the public.
>
> No part of said shore or beach shall ever be sold, conveyed, leased or otherwise disposed of.

The statute declares certain shore and tidelands a "public highway forever."[14] It does not purport to reserve all state-owned tideland in the vicinity as a public highway. We point out that the public highway is not described as abutting upland property; it is defined as "abutting or fronting on said

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[14]The highway created is not a road intended for automobile traffic. It is a recreational area. As Judge Fullerton explained in Williams Fishing Co. v. Savidge, 152 Wash. 165, 181, 277 Pac. 459, 464 (1929):

"... Prior to the year 1901, when the legislature declared the tidelands to be a public highway, the beach had become a favored resort for the people of the state who were seeking rest and recreation, and, as I gather from the surroundings and the current history of the times, the purpose of the legislature was, not so much to establish a thoroughfare, as it was to preserve the beach as a recreational ground for the use of the public. . . . ."

ocean." Its seaward boundary is "extreme low tide"; its inland boundary is the line of "ordinary high tide . . . as such shore and beach now are [1901] or hereafter may be." Assuming that there had been accretion between 1889 and 1901, it does not follow that this statute disclaims state ownership therein. State-owned land may still remain between the inland boundary of the "public highway" (ordinary high tide as such shore and beach now are) and the 1889 line of ordinary high tide. It might, of course, be subject to sale to the abutting upland owner or others as the statutes provide. True, the boundaries of the reserved public highway may shift seaward because of accretion (a question we do not decide), but such move would in nowise affect the inland boundary of state-owned lands. It would simply preserve the prime portion of the beach for the public.

Our interpretation of Laws of 1901 (RCW 79.16.170 quoted supra) is fortified by Laws of 1929, chapter 78, which provides:

> The commissioner of public lands is hereby authorized to offer for sale and sell in the manner hereinafter provided, all, or any portion of, the following described lands:
>
> [described]
>
> lying above and on the land side of the inner boundary of the highway reservations made by chapter CV [105] and chapter CX [110], Laws

of 1901, same being a line of ordinary high tide as the same is now located or as it may hereafter exist.

Thus, the legislature recognized an "inner boundary of the highway reservation" and authorized the sale of lands lying inland of this inner boundary of the highway reservation.[15]

A fundamental error of the trial court in the instant case is the application of the 1901 and 1929 statutory language to "a line of ordinary high tide as the same now is or as it may hereafter exist" to a factual situation to which it has no application.

The Nature of Tides

Tides are the result of gravitational attraction of the moon and sun upon the waters of the earth. Their heights vary with the changing positions of the moon, sun and earth in relation to each other. Changes in winds, barometric pressures, and the freshets or droughts of rivers, together with the geography of the locale, will cause tides to be higher or

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[15]Laws of 1963, chapter 212, p. 1058 provides that that portion of the public highway established by Laws of 1901, chapters 105 and 110 "lying between the line of vegetation and the line of mean high tide, as such lines now are or may hereafter be, is hereby declared a public recreation area and is hereby set aside and forever reserved for the use of the public." We believe this is the first legislative use of the terms "line of vegetation" and "mean high tide" as distinguished from "ordinary high tide."

lower than predicted by the United States Coast and Geodetic Survey. There are usually two high and two low waters or tides a day. They may be designated, lower low water, low water, high water and higher high water. The datum (plane of reference) from which the heights of tides are calculated on the Pacific Coast (with the exception of Balboa, Panama) is the mean or average of the lower of the two low waters of each day.[16]

In Marmer, Tidal Datum Planes, p. 86 (U.S. Dept. of Commerce, Coast and Geodetic Survey, Special Pub. No. 135, rev. ed. 1951), it is stated:

> In view of the variations to which the height of high water is subject, mean high water [tide] at any place may be defined simply as the average height of the high waters at that place over a period of 19 years.

In its findings of fact, the trial court stated:

> mean high tide of the Pacific Ocean is defined as the average elevation of all high tides as observed at a location through a complete tidal cycle of 18.6 years, and the actual western boundary line of plaintiff's property is where that elevation meets the shore as it exists at any particular time.

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[16]Bowditch, American Practical Navigator, p. 252, U.S. Navy Dept. Hydrographic Office, No. 9 (1943); 1965 Tide Tables, p. 7, U.S. Dept. of Commerce, Coast and Geodetic Survey; See United States v. California, 381 U.S. 139, 14 L. ED. 2d 296, 85 Sup. Ct. 1401 (May 17, 1965), in which the court equated the "line of ordinary low water" with "mean lower low water." Shalowitz, 2 Shore and Sea Boundaries 255 (U.S. Dept. of Commerce 1964).

Since the line of "mean high tide" is an average over a period of years of the two daily high tides, one being higher than the other, it is apparent that the higher high tide will wash inland from the line of "mean high tide." This is illustrated by an exhibit showing the observed high tide on January 23, 1963 at a point a few feet south of plaintiff's property to have been 130 feet inland from the line of predicted "mean high tide." The difference in elevation was 3 feet. In the instant case, in front of plaintiff's property the distance between the line of "ordinary high tide" in 1889, as defined by the state, and "mean high tide," as presently determined by the United States Coast and Geodetic Survey and adopted by the trial court, is 561 feet; the difference in elevation is 14.25 feet.

The problem presented is pinpointed by one author as follows

> Boundaries determined by the course of the tides involve two engineering aspects: a vertical one, predicated on the height reached by the tide during its vertical rise and fall, and constituting a tidal plane or datum, such as mean high water, mean low water, etc.; and a horizontal one, related to the line where the tidal plane intersects the shore to form the tidal boundary desired, for example, mean high-water mark. mean low-water mark. . . . The first is derived from tidal observations alone, and, once derived (on the basis of long-term observations), is for all prac-

tical purposes a permanent one. Shalowitz, 1 Shore and Sea Boundaries 89 (United States Department of Commerce 1962).

"Mean high tide" is measurable and determinable.

[3] On the other hand, "the line of ordinary high tide" as used in Article 17 of the constitution is not a term of technical exactness. It is indefinite at best and an over-simplification of a phenomenon inherently complex and variable. In the absence of any indication to the contrary, we deem the word "ordinary" to be used in its everyday context. The "line of ordinary high tide" is not to be fixed by singular, uncommon, or exceptionally high tides, but by the regular, normal, customary, average, and usual high tides. One cannot sit and watch the tide reach its stand at different elevations on each turn as it ebbs and floods without realizing that a line to be fixed by it must be based upon an average. Thus the line of "ordinary high tide" is the average of all high tides during the tidal cycle.

Administrative and Superior Court Interpretations

The record before us supports the conclusion that the commissioner of public lands has established the common boundary between upland property and state-owned land to be the line of ordinary high tide where it existed November 11, 1889. Over the years, 73 lawsuits affecting 322 private ownerships

have been instituted against the state to establish this boundary. The judgments of the superior court are before us as exhibits in the instant case. None was appealed. The state accurately described these judgments when it said in its opening brief:

> In every one of these cases the court has divided the accreted lands on the same formula: those accreted lands formed prior to statehood are the property of the private upland owner; those accreted lands formed since statehood are public beach and shore.

The language of these judgments varies in minor respects. In some the 1889 line of ordinary high tide is related to a surveyed corner and described by metes and bounds; in others it is described as being a stated number of feet above the "line of mean lower low water," thus a standard set by the United States Coast and Geodetic Survey is recognized; in still others the 1889 line is described with particularity by reference to the Washington Coordinate System, South Zone, as claimed by the state in the instant case. In practically all of the judgments the 1889 line as surveyed and described therein is judicially determined to be the line of "ordinary high tide where it existed on the 11th day of November, 1889, established by the commissioner of public lands." Thus over the years the only state constitutional court of general jurisdiction established a rule of property

which has been relied upon and applied on many occasions when the state has sold tidelands pursuant to statutory authority.

Following the decision of this court in Harkins v. Del Pozzi, 50 Wn.2d 237, 310 P.2d 532 (1957), the superior court judgment entered thereafter further described the 1889 line as the line which the water impressed on the soil by covering it for sufficient periods to deprive the soil of vegetation." This added nothing to the line which had already been surveyed and established. In Shelton Logging Co. v. Gosser, 26 Wash. 126. 66 Pac. 151 (1901), this court had already considered the line of vegetation and the line of mean high tide to be the same. Further, in Harkins, supra, there was an unchallenged finding of fact equating "the line of ordinary high water" with the "line of mean high tide." No further description was necessary.

Court Decisions

Two years after its adoption, the landmark case of Eisenbach v. Hatfield, 2 Wash. 236, 26 Pac. 539 (1891), brought Article 17 of the constitution to the Supreme Court for construction and interpreta-

tion. The five-man court[17] was unusually well qualified to consider it.[18]

Plaintiff, the owner of upland property abutting the high-water mark of Puget Sound, claiming he was entitled to certain littoral rights, sought to enjoin defendants from maintaining and using certain improvements upon tidelands in front of the property. The improvements had been erected prior to March 26, 1890, were in actual use for commerce, trade and business, and subject to purchase by defendants under Laws of 1889-90, § 11, p. 435. (See supra.)

[4] At the outset, we emphasize, as does the Eisenbach opinion, that "riparian rights in the several states are settled by the respective states for themselves." The decision was made when the constitution was adopted in 1889 and confirmed by the admission of the state into the federal union upon an equal basis with other states.

The state of Washington asserts its ownership

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[17]See Chronological History of the Supreme Court of the State of Washington, 61 Wn.2d 792, (1963).

[18]Judge John P. Hoyt had been president of the constitutional convention; Judge Ralph O. Dunbar had been chairman of the committee to draft the constitutional provisions for state, school, and granted lands, which encompassed tidelands; and Judge T. L. Stiles, who wrote the dissent, actively opposed constitutional regulation of tidelands on the ground the doctrine was against sound public policy.

> to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows . . . . Art. 17, § 1, State Const.

The constitutional assertion of state ownership is clear and unambiguous. As Judge Anders said in his well-considered opinion, "it is scarcely necessary to look beyond our own constitution and laws for authority to guide us to a conclusion."

In the Eisenbach case, plaintiff contended that whatever may be the title of the state to the soil under tide water, he, by virtue of his contiguity to the water, had certain rights in the shore peculiar to himself. He claimed a vested property right (a) to wharf out opposite his upland and have unobstructed access to the navigable water in front of his property and (b) to acquire by accretion land that might thereafter be formed.

After a meticulous analysis of the authorities, this court said:

> The foregoing decisions of the highest judicial tribunal of the United States, without other or further authority, would seem to settle, beyond controversy, the question of title to the tide lands of this state, and to leave no doubt whatever that they belong to the state in actual propriety, and that the state has full power to dispose of the same, subject to no restrictions save those imposed upon the legislature by the constitution of the state and the constitution of

> the United States; and, if this be true, it necessarily follows that no individual can have any legal right whatever to claim any easement in, or to impose any servitude upon, the tide waters within the limits of the state, without the consent of the legislature.

The court concluded:

> We think the authorities abundantly show that a riparian proprietor on the shore of the sea, or its arms, has no rights as against the state or its grantees to extend wharves in front of his land below high water mark.

The court did not completely resolve plaintiff's second contention in the Eisenbach case—his claimed vested right to future accretion. The court said:

> we are unable to see how one can have a present vested right to that which does not exist, and which may never have an existence.

The court did, however, point out that the authorities to the contrary were, "based either upon statutes or local customs, and are therefore not precedents binding upon us."

[5,6] That which did not exist when Eisenbach was decided — accretions seaward of upland property — now exists. We conclude that its ownership is resolved by the rationale of Eisenbach and that accretion formed since November 11, 1889 is an addition to state-owned property, not to upland property. As the court said:

> The result of our investigation of the authorities leads us to the conclusion that riparian proprietors on the shore of the navigable waters of the state have no special or peculiar rights therein as an incident to their estate. To hold otherwise would be to deny the power of the state to deal with its own property as it may deem best for the public good.

Our conclusion is not startling. It is simply a reaffirmance of a rule of property established by many prior superior court decisions heretofore discussed, and of the rule relied upon over the years in a myriad of land transactions between individuals and between the state and individuals.

At the next session of the Supreme Court the questions discussed in Eisenbach were again submitted to and re-examined by the court in Harbor Line Commissioners v. State, ex rel. Yesler, 2 Wash. 530, 27 Pac. 550 (1891). The court said:

> The court is still of the opinion that, as against the state, a littoral owner, simply as such owner, can assert no valuable rights below the line of ordinary high tide.
>
> The somewhat careful examination which I have given this case has confirmed my opinion that at common law the sovereign power (resting in England in parliament) could take such lands without compensation, and absolutely exclude the littoral proprietors from any rights thereto.

The state's constitutional assertion of ownership

in 1889 terminated any rights the upland owner may have had to future accretion. Thereafter, the possible rights of an upland owner are those that might be established by the legislature.

This conclusion is fortified by the court's opinion in Washougal & LaCamas Transp. Co. v. Dalles P. & A. Nav. Co., 27 Wash. 490, 68 Pac. 74 (1902), wherein the state's grantee of shorelands sought to claim shorelands created in part by erosion (the opposite of accretion) and by debris caught and held by pilings. The court held:

> It cannot be that shore lands created by the erosion of the banks of a stream within the boundaries of a private claim inure to the benefit of the state; nor can the state claim, as shore lands, fills in a river caused by artificial means.

In the instant case plaintiff's (respondent's) argument in support of the judgment of the trial court orbits around three decisions: Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 10, 80 L.Ed. 9, 56 Sup. Ct. 23 (1935), Ghione v. State, 26 Wn.2d 635, 175 P.2d 955 (1946), and U.S. v. State of Washington, 294 F.2d 830 9th Cir. (1961). It was apparently the third decision which triggered this action.

We do not find the three cases apposite. Borax, supra, establishes the rule that mean high tide (the average height of all high waters through a com-

plete tidal cycle) is the criterion for "ordinary high water."[19] The case does not involve the question of accretion.

Some of the language in Ghione, supra, read without reference to the particular facts before the court, seems to lend weight to respondent's argument in support of the judgment. This case, however, involves the ownership of the bed of two rivers, first surveyed in 1865. River courses had changed gradually over the years; one was changed artificially in 1913. Finally one river ceased to flow when the level of the water of Lake Washington was lowered in 1915. The case does not involve tidelands. We have no quarrel with the decision as applied to the facts; we do not, however, deem it controlling of the instant case.

[7] In United States v. State of Washington, 294 F.2d 830 (1961), certain lots in Grays Harbor abutting on the Pacific Ocean belonged to the federal government subject to a trust patent issued in 1916 to Samson Johns, a Quinault Indian. The lots were at all times part of the public domain until patented. The court applied federal law and determined that ac-

[19]We are aware of the footnote reference in Narrows Realty Co. v. State, 52 Wn.2d 843, 329 P.2d 836 (1958), equating "the line of ordinary high tide" with "neap tides," but the reference is not necessary to the decision and is, therefore, dictum.

cretion belonged to the uplands owned by it subject to the trust patent. We do not question the federal government's right over its own property, but the rules applied by the United States Court of Appeals do not override the established rules of property of the sovereign state in a controversy between it and one of its citizens.

In conclusion, we hold that the state acquired ownership of tidelands in actual propriety November 11, 1889. The property line is the line of ordinary high tide, which we equate to mean high tide on that date. Littoral rights of upland owners were terminated. Upland owners have only those rights subsequently recognized by legislative enactment. All accretion subsequent to November 11, 1889 is owned by the state and may be sold or reserved as a public highway or public recreation area as the legislature shall determine.

The judgment is reversed and the cause remanded for entry of judgment not inconsistent with the views herein expressed.

It is so ordered.

ROSELLINI, C. J. FINLEY, J. HAMILTON, J.
DONWORTH, J. OTT, J. HALE, J.

concur.

HILL, J. (dissenting)—I find myself lost in admiration at the scholarship and erudition manifested in the majority opinion. However, all the legal signposts that I can read and understand point in the opposite direction, so I am compelled to dissent.

We *must decide* whether the westerly (seaward) boundary of Stella Hughes' property is the present mean high tide line, or whether it is the line of ordinary high tide as the state of Washington computes it to have been on November 11, 1889. It is really as simple as that.

Signpost 1: Location of plaintiff's westerly (seaward) boundary is a federal question.

The plaintiff traces her title to a federal patent issued before Washington became a state. This court recognized a long time ago the right of federal courts to ascertain the limit of federal grants. See Washougal and LaCamas Transporation Co. v. Dalles, Portland and Astoria Navigation Co., 27 Wash. 490, 496, 68 Pac. 74 (1902). In Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 10. 80 L.Ed. 9, 56 S. Ct. 23 (1935), it was stated that when a federal patent is involved, the boundary between upland and tideland is necessarily a federal question. True, no accretions were involved, but it seems unlikely that this would

have made any difference as to whether federal law should be applied.

Signpost 2: Federal law being applicable, the "shifting boundary theory" applies.

If federal law is applicable, then United States v. State of Washington.[20] 294 F.2d 830 (9th Cir. 1961), cert. den. 369 U.S. 817 (1962), is decisive. That case holds that imperceptible accretions go with the uplands whenever title to the uplands is derived from the United States. The western or seaward boundary to the property involved[21] in that case was, as here the line between uplands and tidelands. The present line of "mean high tide," which was defined as the average elevation of all high tides at a given location through a complete tidal cycle of 18.6 years,

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[20]It is interesting to note that in the cited case the state of Washington made all of the arguments it makes here for its fixed boundary of November 11, 1889, but found the Circuit Court of Appeals a forum less friendly to its idea of rewriting the law relative to accretions.

[21]The property involved: "Lots 3 and 4 of section 15 in township 18 north of range 12 west of the Willamette Meridian, adjacent to the Pacific Ocean in Grays Harbor County, Washington," belonged to the United States, subject to a trust patent issued in 1916 to Samson Johns, a Quinault Indian who died in 1930. In 1858, these lands were surveyed by the General Land Office, which established a meander line along and adjacent to the Pacific Ocean. The accretions which pushed the high-water mark seaward were held to belong to the United States subject to the heirs of Samson Johns, and not to the state of Washington.

was held to be that boundary. This definition was formulated by the United States Coast and Geodetic Survey and is part of what has been called the "shifting boundary theory." 2 Shalowitz, Shore and Sea Boundaries, 503 note 34.

This is the western or seaward line fixed by the trial court in this case, and it should be affirmed.

If this seems a ridiculously short and simple solution of the apparently complex problem with which the majority opinion deals, I can only say that it is the result dictated by common law,[22] and (as we have seen) by the federal law. It is a plain and well-traveled legal path. To arrive at the result the state desires (and the majority approves), a new, circuitous and rather devious route, rarely explored, must be followed. This is conceded in the state's brief when it says:

> It is a rare occurrence, of course, when a state denies a riparian owner title to tidelands[23] that have become fast lands by slow and imperceptible accretion, but at least two other states have done so. . . .

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[22]" . . . At common law the person whose land is bounded by sea, lake or river owns any additions thereto resulting from imperceptible accretion." United States v. Washington, supra (p. 834); Shively v. Bowlby, 152 U.S. 1, at page 35, 38 L.Ed. 331, 14 Sup. Ct. 548 (1894).

[23]I would interpolate "former" before "tidelands."

I would extend my discussion to point out four interesting circumstances that have been lost sight of, or at least have been obscured, to date:

1. We have not previously defined the exact meaning of the phrase "line of ordinary high tide," as used in Art. 17, § 1 of our state constitution.

The case of Harkins v. Del Pozzi, 50 Wn.2nd 237, 240, 310 P.2d 532 (1957) states:

> The line of ordinary high tide is that line which the water impresses on the soil by covering it for sufficient periods to deprive the soil of vegetation and destroy its value for agricultural purposes.

However, the authority cited for this proposition is an Idaho case which was actually concerned with the ordinary high water mark on Lake Pend Oreille. The Circuit Court of Appeals rejected such a definition in United States v. State of Washington, supra, saying:

> In the case of tidal waters such as are involved here, the high-water mark means the line of high water as determined by the course of the tides, not as determined by physical markings made upon the ground by the water. The latter method of making this determination, which was followed by the district court, is appropriate only in the case of streams and other non-tidal waters which have no absolute ascertainable level because of variations of flow from a multitude of causes. (p. 834)

There is also dictum in Narrows Realty Co. Inc. v. State of Washington, 52 Wn.2d 843, 844, n3 329 P.2d 836 (1958), which defines the phrase as:

> ". . . . line of 'ordinary high tide,' that is, the usual or ordinary high-water mark, the limit reached by the 'neap tides,' those tides which happen between the full and change of the moon twice in every 24 hours . . ." 30 Words & Phrases 253. (Perm. ed.)

Neither of these cases involved imperceptible accretions or were concerned with the problem of possible shifting boundaries.

The question of whether the "line of ordinary high tide" is a shifting line is squarely presented here, and I believe the definition of this constitutional phrase should (and perhaps must) be identical with the definition of "mean high tide" heretofore quoted and adopted by the federal courts.

2. The state's ownership of

> the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows . . . [Const. art. 17, § 1]

is not questioned. Any rights of riparian or littoral owners in such "beds and shores" have properly been held to present a question of local law. Such a case was Eisenbach v. Hatfield, 2 Wash. 236, 26 Pac. 539 (1891), on which the state and the majority

place great reliance. The case dealt solely with the relative rights of the state and the upland owner in the tidelands, the court holding that the upland owner had no right to extend a wharf beyond the high-water mark. The court specifically declined to decide whether plaintiff would be entitled to future accretions to his land.

No question, as to the complete control of the state over "beds and shores" of all navigable waters is raised. Hence, the Eisenbach case has, it seems to me, no application.

The state had, on November 11, 1889, and the state has today and has had at all intervening times, title to the beds and shores of all navigable waters of the state lying seaward of the line of ordinary high tide (properly equated to mean "the line of mean high tide," as defined herein). The state loses no tidelands by the shifting boundary, because the accreted land has become "fast land" and it always has had title to the shore and beach between ordinary high tide (mean high tide) and extreme low tide. But, by the fixed-boundary rule, which Washington and "at least two other states" have invented, the upland owner loses the "fast land," which has been added to his upland by slow and imperceptible accretion, and his contact with the line of mean high tide

which, in many instances, may have been the reason for the acquisition of the property.

It is apparent also that the purpose of the state is not primarily to make a greater area available for public use, but to dispose of such accreted lands to private individuals and put a new upland owner between the grantees of the original upland owner and the line of mean high tide. That the state does not consider accretion as shore or beach, is evidenced by its sale thereof, for the state certainly would not disregard the statutory declaration that

> [S]hore and beach of the Pacific Ocean, . . . between ordinary high tide [mean high tide] and extreme low tide . . . shall remain forever open to the use of the public, [RCW 79.16.170]

and that no part thereof "shall ever be sold, conveyed, leased or otherwise disposed of." (RCW 79.16.171)

3. The really pertinent decision in Washington is not the Eisenbach case, which has nothing to do with imperceptible accretions, but the case of Ghione v. State, 26, Wn.2d 635, 175 P.2d 955 (1946). The state asserted there, as it does here, that it was entitled to all lands covered by navigable waters in 1889. The state also contended that it was entitled to all lands submerged by navigable waters subsequent to 1889.

The court discussed a number of cases—including Eisenbach and an 1899 statute on accretions (cited here by the majority—before adopting a shifting boundary theory which vested title to imperceptible accretions in the upland owner. The majority seeks to distinguish the Ghione case because it involved a river, but the court there believed that the shifting boundary theory applied "to both tidewaters and fresh waters," and there is no apparent reason for distinguishing between them.

4. No consideration has been given to the effect of the fixed boundary theory where there has been an erosion instead of an accretion. We can only speculate as to how the majority opinion would read if this were an erosion case. At certain places, the 1889 line of ordinary high tide or mean high tide is now a long way out in the Pacific Ocean, in consequence of erosion, and the upland owner has seen his upland become tideland to which he has heretofore thought he had no title. Under the majority rule, the upland owner would continue to have title to the 1889 line, and the public, seemingly, would have to swim to enjoy its "highway" and beach rights. Only under the shifting boundary rule will the rights of the public always be preserved in the property in the beds and shores of all navigable waters in the

state, up to and including the line of ordinary high tide—"in waters where the tide ebbs and flows."

I would follow the federal cases, adhere to the shifting boundary rule, and affirm the trial court.

HUNTER, J. concurs with HILL, J.

APPENDIX "K"

ORDER DENYING PETITION FOR REHEARING

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STELLA HUGHES, Respondent. vs. THE STATE OF WASHINGTON, Appellant.	No. 37583 ORDER DENYING PETITION for REHEARING

The Court having considered the respondent's petition for a rehearing herein together with the appellant's answer thereto, and a majority of the Judges being of the opinion that it should be denied,

IT IS ORDERED that the petition be and it is hereby denied.

Dated this 14th day of April, 1966.

By the Court:

/s/ HUGH J. ROSSELLINI
Chief Justice

67 W.D.2d 787

APPENDIX "L"

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STELLA HUGHES, Respondent, v. THE STATE OF WASHINGTON, Appellant.	**REMITTITUR** No. 37583 Pacific County No. 14546

This is to certify that the opinion of the Supreme Court of the State of Washington filed on January 20, 1966, became the final judgment of this court in the above entitled case on April 14, 1966. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached certified copy of the opinion.

Pursuant to Rule 55 on Appeal, cost are taxed as follows:

Three Hundred Eighteen and 61/100 ($318.61) Dollars in favor of appellant and against respondent.

The Petition for Rehearing was Denied by an Order filed April 14, 1966.

cc: Court Reporter

Hon. John J. O'Connell
Mr. Harold T. Hartinger
Mr. Laurel L. Tiller
Mr. Charles B. Welsh

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 14th day of April, A.D. 1966.

WILLIAM M. LOWRY

SUPREME COURT, U.S.

FILED
SEP 6 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1966

No. ~~800~~ 15

STELLA HUGHES, *Petitioner*,

v.

STATE OF WASHINGTON, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1966

No. 339

STELLA HUGHES, *Petitioner*,

v.

STATE OF WASHINGTON, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1966

No. 339

STELLA HUGHES, *Petitioner*,

v.

STATE OF WASHINGTON, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The oral opinion of the Superior Court of the State of Washington for Pacific County (R. 22-29) is unreported but appears in the Appendix to Petition for Certiorari at pages 29-36. The opinion of the Supreme Court of the State of Washington and the dissenting opinion (App. to Pet. 59-92; R. 53-83) are reported at 67 Wash. Dec. 2d (Adv. Shts.) 787, 410 P.2d 20.

QUESTIONS PRESENTED

1. Whether the State of Washington by its constitution may abolish an upland owner's common law riparian right to acquire future title to adjoining tidelands by accretion where title to the upland owner's property is deraigned from a United States patent issued prior to statehood?

2. Whether the designation by the Washington Constitution of the *line of ordinary high tide* as the boundary of tidelands (rather than the line of mean high tide as defined by the U. S. Coast & Geodetic Survey) is invalid as to tidelands adjoining upland property, title of which is deraigned from a United States patent issued prior to statehood?

ARGUMENT

I

The State of Washington believes that the decision of the Supreme Court of the State of Washington on the first question involves no substantial federal question and is so manifestly correct that no further review is appropriate.

Article 17, section 1, of the Washington Constitution operates to abolish all common law riparian rights of lands bordering upon navigable waters. *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539 (1891); *Brace & Hergert Mill Co. v. State*, 49 Wash. 326, 331, 95 Pac. 278, 280 (1908), and cases cited; *State v. Sturtevant*, 76 Wash. 158, 163, 135 Pac. 1035, 1037 (1913), and cases cited; *Grill v. Meydenbauer Bay Yacht Club*, 61 Wn.2d 432, 435, 378 P.2d

423, 424-25 (1963). So well established is this rule that Mr. Justice Brandeis noted its existence for this court in *Port of Seattle v. Oregon & Washington R.R.*, 255 U.S. 56 (1921).

Thus, under the doctrine of these cases, the riparian rights of wharfage, ferriage, access, and future[1] accretions (rights ordinarily accorded by the common law to the owner abutting navigable water) are not rights good as against the State of Washington's title to tidelands.[2] There is no infirmity in this Washington doctrine because the riparian owner can trace his title back to a federal patent. This court long ago ruled, *Water Power Co. v. Water Comm'rs*, 168 U.S. 349, 363 (1897):

> It does not impair the efficacy of the grant or the use and enjoyment of the property by the grantee to hold that riparian rights are to be decided by the state courts, inasmuch as the grant, if by the Federal Government, has been held in the cases already cited, not to include title over navigable waters within or bound by the States.

Nor can the Washington doctrine on accretions be seriously challenged on any other ground. *Western Pac. Ry. v. Southern Pac. Co.*, 151 Fed. 376, 400 (9th Cir. 1907), sustaining a California statute,[3] well expresses our position on this point:

---

[1]The state makes no claim to title to accreted lands which vested *prior* to statehood.

As a corollary to the Washington rule, the state acquires no title to uplands by erosion. Washougal Transp. Co. v. Dalles, Etc., Nav. Co., 27 Wash. 490, 68 Pac. 74 (1902).

[2]Black's Pomeroy on Water Rights 534-40 (1893).

[3]Spanish civil law precedents for the California statute and the Washington doctrine on accretion are found in Ker v. Couden, 223 U. S. 268, 278-79 (1911), and Zeller v. Yacht Club, 34 La. Ann. 837 (1882) (only proprietors on rivers and streams could acquire title by accretion).

> [T]he decision in *Shively v. Bowlby*, 152 U.S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331, sustains the power of a state to cut off, without compensation, the right of a riparian proprietor to future accretion. We know of no decision in which this doctrine has been questioned. If it is within the power of the state to thus appropriate and improve tide land or submerged land in front of a riparian proprietor, and thus deprive him of the right to future accretion, what tenable ground is there for saying that the state may not by a statute accomplish the same result, and for holding that the state of California by its statute of 1872 could not make provision, as it did, that the limits of lands owned by riparian proprietors of bays and arms of the sea could not be extended over the lands then held by the state in trust for the public by virtue of any accretion that might thereafter be deposited thereon?

The only arguable limit on the Washington accretion doctrine is the ruling of the U. S. Court of Appeals for the Ninth Circuit, *United States v. Washington*, 294 F.2d 830 (1961), *cert. denied*, 369 U.S. 817 (1962), holding that the Washington modification of the common law did not apply to lands owned by the United States and held in trust for an Indian, Samson Johns of the Quinault Tribe. This issue is not before the court in this case, however. Here the government parted with title to the property in question by a pre-statehood patent.

II

As to the second question presented, the Supreme Court of the State of Washington was also right to apply the Washington constitutional definition as to the limits of tidelands even though title to the adjoining uplands was deraigned from the United States under a pre-statehood patent. The court was not bound to limit the state's constitutional claim to tidelands to those lying below the tidal datum plane of mean high tide as defined by the U. S. Coast & Geodetic Survey.

Under the Washington Constitution, as interpreted in this case and in the past,[1] the federal court rule for dividing tidelands from uplands, as it existed at the time Washington became a state, *San Francisco v. Le Roy*, 138 U.S. 656, 671-72 (1891); *cf. Shively v. Bowlby*, 152 U.S. 1, 57 (1894), was adopted as state law, thus making the state rule as to tidelands the same as the state rule for dividing lakebed from uplands, *Austin v. City of Bellingham*, 69 Wash. 677, 680-81, 126 Pac. 59, 61 (1912), and riverbed from uplands, *Washougal Transp. Co. v. Dalles, Etc., Nav. Co.*, 27 Wash. 490, 497, 68 Pac. 74, 77 (1902).

In the present case, where the state tidelands adjoin uplands patented prior to statehood by the federal government, federal law does not call for the nullification of state law; federal law incorporates

[1] Harkins v. Del Pozzi, 50 Wn.2d 237, 310 P.2d 532 (1957); Shelton Logging Co. v. Gosser, 26 Wash. 126, 66 Pac. 151 (1901).

state law where no contrary rule is demanded by the federal patent itself or by any federal statute or treaty. *Oklahoma v. Texas*, 258 U.S. 574, 594-95 (1922); *United States v. Oregon*, 295 U.S. 1, 27 (1935). *Cf. Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966). The doctrine of *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), and similar cases,[5] does not call for federal court nullification of the state constitutional rule. Our federal system does not permit federal courts to judicially refashion or disregard state law in the absence of compelling federal interests. See, *e.g.*, *United States v. Yazell*, 382 U.S. 341 (1966). Petitioners here point to no compelling interest to be served by nullifying state law and substituting federal "common law" fashioned by this court for the determination of the boundary of state-owned tidelands.

Nothing said in *Borax, Ltd. v. Los Angeles*, 296 U.S. 10 (1935), requires a reversal of the judgment in this case when that case is properly understood. Our briefs before the Washington Supreme Court set out the state's explanation in detail.[7] Here we pause only to point out that *Borax* was decided prior to *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), at a time when the federal courts were still reshaping judge-made law of the states. Thus *Borax* must be

[4] See, generally, Miskin, *The Variousness of "Federal Law:" Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797 (1957).

[5] *E.g.*, United States v. Allegheny County, 322 U.S. 174 (1944); D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447 (1942).

[7] Brief of Appellant (R. 84) 65-70 (not reprinted in App. to Pet.); Reply Brief of Appellant (R. 86) 8-12 (reprinted in App. to Pet. 55-58).

considered as a ruling on California law. Nonetheless, since it can reasonably be argued that the U. S. Court of Appeals for the Ninth Circuit has construed the case to the contrary, *United States v. Washington*, 294 F.2d 830 (1961), *cert. denied*, 369 U. S. 817 (1962), there is some justification for review of the second question stated above.

III

The petitioner has urged invasion of Fifth and Fourteenth Amendment rights as grounds for review. Petition 8, 21-22. We find no merit in these contentions for the reasons set out above, but in any event these issues are not appropriate for review because they were not raised, considered, nor decided by the trial or appellate courts below.

Conclusion

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari be denied. However, if the court believes that important federal-state interests will be advanced by review of this case in the light of *Borax, Ltd. v. Los Angeles*, 296 U.S. 10 (1935), we believe the grant of certiorari should be limited to the second question stated above.

Respectfully submitted,

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Counsel for Respondent

September 1966

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 339

STELLA HUGHES, PETITIONER

v.

STATE OF WASHINGTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of October 10, 1966, inviting the Solicitor General to file a brief expressing the views of the United States in this matter.

This suit was brought by the petitioner, as owner of ocean front land in the State of Washington, against the State, to quiet her title to an area of alluvion formed by gradual, natural accretion to her land. The petitioner's title derives from a federal patent issued before statehood. Her contention is that federal law is controlling, and that under federal law the seaward boundary of her property is the line of mean high tide as continually modified by gradual, natural accretion, erosion, or reliction.

The State concedes petitioner's right to alluvion deposited before statehood, but contends that upon its admission to the Union in 1889 the State became owner of the tidelands (*i.e.*, the lands between the lines of high and low tide); that State law thereupon established a permanent, immovable boundary between the petitioner's upland and the State's tideland; and that consequently all subsequent accretion along the shore belongs to the State. The Superior Court for Pacific County, relying primarily on *Borax, Ltd.* v. *Los Angeles,* 296 U.S. 10, and *United States* v. *Washington,* 294 F. 2d 830 (C.A. 9), certiorari denied, 369 U.S. 817, held (Pet. App. 33–36) that the seaward boundary of petitioner's property is determined by federal law and that under federal law an upland owner is entitled to gradual accretions. The Supreme Court of Washington, *en banc,* reversed, with two judges dissenting (Pet. App. 59–92). It held that federal law is inapplicable and that under the law of Washington the seaward boundary of ocean front property, at least when not owned by the United States, is fixed by the line of high tide on November 11, 1889—the date on which Washington was admitted to statehood.

For petitioner, the practical consequence of the decision below is that the ocean front property which her predecessor in title obtained from the United States is now held to be some 560 feet inland. In the view of the United States, the case presents an important question of federal law, involving a source of serious friction in federal-state relations, which merits review by this Court. We will show, first, the

importance of the issue and, second, the error committed by the court below in disregarding the federal law.

1. The decision below holds that, in Washington, the United States lacks the power to convey property bounded by the line of mean high tide as that line may be gradually modified by natural forces. On a coast line marked by gradual but continuous accretion, the decision means that the United States is incapable of conveying ocean front property and that its attempt to convey such property to petitioner's predecessors in title was ineffective.

The decision is of broad consequence. It trenches on a significant element of title to realty acquired from the United States in the past and it materially curtails the nature of the title that the United States may convey in the future. The decision directly affects not only petitioner, but numerous other federal patentees of coastline property in Washington, for whom this is a test case (Pet. App. 23). Equally important, it affects the powers of the United States with respect to more than 200 miles of Washington's coastline owned today by the federal government.[1] Moreover, the principle of a fixed tideland boundary

[1] The records of the Department of the Interior reveal that public and acquired lands of the United States stretch along approximately 215 miles of the Washington coast (including Puget Sound and off-shore islands). These holdings include some 93 miles in the custody of the Bureau of Sport Fisheries and Wildlife; some 50 miles in the custody of the National Park Service; and some 72 miles supervised by the Bureau of Indian Affairs. An additional 72 miles of coastline are presently being acquired for the National Park Service. As to acquired land, the United States presumably obtains no greater rights than those enjoyed by its grantors.

may readily be brought to bear on the property of the United States and its patentees in other coastal States. Cf. La. Civ. Code, Art. 510; *Zeller* v. *Southern Yacht Club,* 34 La. Ann. 837. Nor is there any apparent reason why, in Washington or elsewhere, the principle should be limited to tidelands; it can be applied with consistency of logic to the shifting banks of rivers and lakes owned by a State. Compare *Ghione* v. *Washington,* 26 Wash. 2d 635. An inducement for the adoption and expansion of this principle is not lacking, since it tends inevitably to bring land into State ownership,[2] and the sale of land thus acquired has been recognized as an attractive source of State revenue (see Pet. App. 90).

To be sure, the court below stated that it did not "question the federal government's right over its own property" and confined its decision to the "rules of property of the sovereign state in a controversy between it and one of its citizens" (Pet. App. 83). It did so in deference to the decision of the Ninth Circuit in *United States* v. *Washington,* 294 F. 2d 830, certiorari denied, 369 U.S. 817, which rejected the State's claim to ownership of accretions upon property held by the United States subject to a trust,

[2] In *Ghione* v. *Washington, supra,* the State asserted title to all land which had served as the bed of a shifting river at any time since 1889. That contention was rejected by the State Supreme Court relying on principles of State law which have at least been cast into doubt by the decision below. The only circumstance in which, under the fixed boundary rule, the State might conceivably lose property is that of coastal erosion. But Washington has not conceded that, where the 1889 line of high tide is now out at sea, the former upland owner now has title to tidelands traditionally owned by the State.

patent, issued in 1916, for the heirs of Samson Johns, an Indian. But while purporting to acquiesce in that decision, the court below failed to recognize that "the federal government's right over its own property" embraces the right effectively to dispose of such property. Indeed, the land involved in the Samson Johns case was the federal government's "own" property only in a qualified sense, inasmuch as beneficial ownership had been conveyed to Samson Johns more than 40 years earlier. As the Ninth Circuit noted (294 F. 2d 830, 832): "If the upland owner is entitled to the imperceptible accretions it is because this is an attribute of title reserved to *or obtained by grant from* the Government" (emphasis added). In holding that, by virtue of State law, the government's grantees do not obtain entitlement to such accretion, the decision below is in direct conflict with that of the Ninth Circuit.

The consequence of that conflict is readily apparent in the context of the property involved in the Samson Johns case itself. Today, and for more than 40 years past, the American Indians occupying that property have enjoyed the beneficial ownership of a tract running down to the ever-shifting line of mean high tide. Sections 5 and 6 of the General Allotment Act of February 8, 1887 (25 U.S.C. 348, 349) contemplate the eventual termination of the Johns trust—and a great many similar trusts—by a patent of legal title. Under the decision below, when that event occurs the Indians' enjoyment of adjacency to the tidelands will also terminate, at least to the extent of all future accretion. Indeed, the courts of Washington might well hold that all accretion occurring since the attain-

ment of statehood in 1889 reverts to the State when the federal government relinquishes its title. But even if that extreme position were not taken, the asserted inability of the federal government to convey to its wards an important attribute of the title it now holds in trust for them—namely the right to future accretions—would seriously inhibit the furtherance of the government's Indian program through the disposition of land. While the problem thus raised with respect to Indian lands is exemplary, it is also clear that the decision below restrains the government from disposing of the full measure of its title in connection with any program or policy which it may wish to pursue in the future. In sum, we do not believe that it can be said here, as it could in *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63, 68, that there is "no significant threat to any identifiable federal policy or interest".[3]

2. The precise question considered by the courts below and presented by the petition here is whether the physical limits of property conveyed under a federal patent can be altered by State law.[4] The courts

[3] In *Wallis*, *supra*, we advised the Court that in our view, "no federal interest appears to be impaired by deferring to State law." Memorandum for the United States as *Amicus Curiae*, p. 16 (No. 341, October Term, 1965).

[4] Unquestionably, a State may augment a federal patent, as many States have done, by relinquishing to the patentee some rights in or title to the adjacent water bottoms to which the State is entitled under *Pollard* v. *Hagan*, 3 How. 212. *Barney* v. *Keokuk*, 94 U.S. 324, 338. The extent of such relinquishment is of course a matter of State law. The instant case is not such a situation, but one where the State has purported to change the boundary in a way that operates to the serious disadvantage of the patentee. The invalidity of such State action was recognized in

below and the parties all assumed—correctly we believe—that, if federal law governs, petitioner is entitled to judgment. The soundness of that assumption is readily demonstrable, for this Court, in the absence of congressional legislation, has largely reaffirmed the English common law of accretion in cases of federal jurisdiction.

At common law, the title of the Crown to the lands under navigable water extended to the line of ordinary high water, as continually modified by gradual, natural processes. *Stratton* v. *Brown,* 4 Barn. & C. 485, 107 Eng. Rep. 1140 (K.B. 1825); *The King* v. *Lord Yarborough,* 2 Bligh N.S. 147, 4 Eng. Rep. 1087 (H.L. 1828); see 2 Blackstone, *Commentaries* 262. This Court has regularly relied on the common law authorities to hold that the boundary between the upland and the submerged land acquired by the States as a constitutional attribute of their sovereignty is an ambulatory boundary. *E.g., New Orleans* v. *United States,* 10 Pet. 662, 717; *Jones* v. *Johnston,* 18 How. 150, 155–156; *Banks* v. *Ogden,* 2 Wall. 57, 67; *County of St. Clair* v. *Lovingston,* 23 Wall. 46, 66; *Barney* v. *Keokuk,* 94 U.S. 324, 337–338; *Jefferis* v. *East Omaha Land Co.,* 134 U.S. 178, 189.

Under these decisions it is clear that the right to accretion recognized by federal law is not a mere appurtenance to the upland, giving a right of use in the tideland, such as the right to fill or wharf out.

Packer v. *Bird,* 137 U.S. 661, 669, where the Court said, "whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, *subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee*" (emphasis added).

It is an inherent characteristic of the upland title, resulting from the fact that the upland boundary is the water line. This "is just as fixed a boundary in the eye of the law" as a street or a wall, notwithstanding that it may gradually and imperceptibly change. *Jones* v. *Johnston,* 18 How. 150, 155. That is why it was held in *County of St. Clair* v. *Lovingston,* 23 Wall. 46, 68, "The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property."[5] This Court has also clearly pointed out the distinction between a littoral owner's rights in the adjacent beds of navigable waters, such as the right to fill or wharf out, which are controlled by State law, and his right to alluvion, which is a part of his upland title. *Shively* v. *Bowlby,* 152 U.S. 1, 35, 40.

From the foregoing, three things are apparent: *First,* this is not a case in which federal common law has to be created; over a long period of time this Court has fashioned a well developed body of legal principles applicable to the substantive issue here. Compare *Wallis* v. *Pan American Petroleum Corp.,* 384 U.S. 63, 68. The question presented, therefore, is limited to whether those federal principles, with reference to which the patent issued, are to be given

[5] This does not mean that the riparian or littoral owner has a right to have accretion occur, or a right to forestall its prevention. The State may fill in its tidelands artificially, which has the practical effect of freezing the boundary at the last natural waterline, but this does not change the nature of the title; it merely prevents the occurrence of natural events that might otherwise have enlarged the area to which that title is applicable.

effect. Thus, unlike *Wallis, supra,* the question is not "[w]hether latent federal power should be exercised to displace state law" (384 U.S. at 68), but rather whether property rights created under federal law may be divested by State action. *Second,* the federal patent under which petitioner claims must be construed to have conveyed a vested right to an ambulatory seaward boundary for it was issued prior to Washington's statehood and, presumptively, with reference to the federal decisions cited above (p. 7, *supra*).[6] Hence, it cannot be doubted (and it was not doubted below) that the State has purported to deny petitioner an attribute of title which the United States intended to convey. *Third,* the State's claim, insofar as it rests on an assertion of its sovereign title to tidelands, derives from and is measured by federal common law. This is so because its title to tidelands is based on its constitutional right to stand on an equal footing with other States. Its right in this respect can neither be less than theirs, *Pollard* v. *Hagan,* 3 How. 212, nor greater, *United States* v. *Texas,* 339 U.S. 707. The common law rule governing the sovereign's ownership of the tideland (see *supra,* p. 7), as absorbed

[6] It should be noted that the patent itself does not appear to have been put in evidence below. We assume, as the courts below assumed, that the patent in some appropriate way described a tract bounded on its seaward side by the line of high tide. We also assume that, between the time of the survey in which the tract was laid out and the time of the patentee's entry, there had not been such substantial accretion as to put the patentee on notice of the government's mistake in conveying a tract inequitably larger than those conveyed to other patentees where similar tracts were intended. See *Madison* v. *Basart,* 59 I.D. 415.

by the original States and reaffirmed by this Court, has of necessity, therefore, become the constitutional yardstick of the title obtained by all the subsequent States. That yardstick undeniably lays out an ambulatory boundary on the landward side of the State's tidelands and, thus, on the seaward side of the uplands.[7]

We think that the federal source of petitioner's title, the constitutional implications of the State's claim, as well as the substantial federal interests involved combine to demonstrate the inappropriateness of the State court's attempt to resolve the issue without reference to a well established body of federal law. That federal law does control the issue here is we think settled by this Court's decision in *Borax, Ltd.* v. *Los Angeles,* 296 U.S. 10. That case, while not concerned with accretion, did involve a disputed boundary between a State grantee of tideland and a federal patentee of upland. Chief Justice Hughes there wrote for the Court (296 U.S. at 22):

> The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law. *Packer* v. *Bird,* 137 U.S. 661, 669, 670; *Brewer-Elliott Oil Co.* v. *United States,* 260

[7] While the State may undoubtedly enlarge its holdings through an appropriate exercise of its powers of eminent domain, no such power has been invoked here, and the questions of just compensation which it would raise under the Fifth and Fourteenth Amendments have not been considered.

U.S. 77, 87; *United States* v. *Holt Bank*, 270 U.S. 49, 55, 56; *United States* v. *Utah*, 283 U.S. 64, 75. * * *

Because we see no valid ground on which to distinguish *Borax*, we believe that here, too, "the boundary between the upland and the tideland is necessarily a federal question."

CONCLUSION

For the foregoing reasons, we urge that the petition for a writ of certiorari be granted and the judgment of the Supreme Court of Washington be reversed.

Respectfully submitted.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1966

No. ~~339~~ 75

STELLA HUGHES, *Petitioner*,

v.

STATE OF WASHINGTON, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

REPLY TO MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1966

No. 339

STELLA HUGHES, *Petitioner*,

v.

STATE OF WASHINGTON, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

REPLY TO MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The petition for certiorari seeking review of *Hughes v. State of Washington*, 67 Wn.2d 799, 410 P.2d 20 (1966), raises two questions (*Brief in Opposition*, p. 6):

1. Whether the State of Washington by its constitution may abolish an upland owner's common law riparian right to acquire future title to adjoining tidelands by accretion where title to the upland

owner's property is deraigned from a United States patent issued prior to statehood?

2. Whether the designation by the Washington Constitution of the *line of ordinary high tide* as the boundary of tidelands (rather than the line of mean high tide as defined by the U. S. Coast & Geodetic Survey) is invalid as to tidelands adjoining upland property, title of which is deraigned from a United States patent issued prior to statehood?

The Solicitor General has filed a *Memorandum for the United States as Amicus Curiae* in response to the Court's order of October 10, 1966. The government's remarks appear to be limited to question No. 1. The State of Washington submits this brief in reply to the government's assertion that the first question merits review by this Court.

INTRODUCTION

Prior to the date of Washington's statehood the United States gave its patent to uplands bordering the Pacific Ocean to the petitioner's predecessor in interest.[1] Thereafter, both before and after the date of statehood, imperceptible accretions formed along the shore in front of the property. *Pet. App.* 60. The record does not disclose the extent of the accreted land formed between the date of the patent and the date of statehood, but the record does show that 175

[1]The patent was not put in evidence. However, to dispel any inference that the government by the patent purported to convey a "vested right to an ambulatory seaward boundary," *Memorandum* p. 9, we have set the patent out in full in Appendix A, *infra*, pp. 12-13.

feet of accreted land has formed since the date of statehood.[2] *Pet. App.* 63.

The state made no claim to the accreted land formed prior to statehood. *Pet. App.* 60. Title to this land vested in the original patentee and his successors as the land was formed, all in accordance with the common law in effect prior to the adoption of the Washington Constitution. See Wash. Terr. Laws of 1862, p. 83, § 1; Wash. Terr. Laws of 1877, p. 3, § 1; Wash. Terr. Code of 1881, § 1.

The state did claim the accreted lands formed since statehood. It did so on the ground that the applicable law for this period was *state law* that had modified the common law doctrine of accretion. *Pet. App.* 41-49. The Washington Supreme Court agreed with this contention, holding that the Washington Constitution had abolished all common law riparian rights of lands bordering upon navigable waters—including the riparian right to future accretions. (Our short summary of this feature of Washington law will be found in our *Brief in Opposition*, pp. 6-7.)

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[2]The *Memorandum for the United States*, p. 2, unfortunately leaves the impression that "some 560" feet of accreted land was formed after statehood. This is not so. Examination of the Court's diagram (*Pet. App.* 63) shows that ownership of 386 of the total 561 feet of property in dispute depends upon the determination of question No. 2.

REPLY TO THE GOVERNMENT

1. The United States urges review of the decision below because of the impact it may have on the government's extensive land holdings in the State of Washington. *Memorandum*, pp. 2-6. We therefore think it is important to note an exception to the Washington rule that the riparian right to future accretions is not a right good as against the State of Washington's title to tidelands.

In deference to the views of the Ninth Circuit Court of Appeals in *United States v. Washington*, 294 F.2d 830 (1962), the Washington Supreme Court acknowledged that the constitutional abolition of the riparian right does not apply to the public domain of the United States. *Pet. App.* 82-83. It becomes effective only after the United States parts with title. In such cases, therefore, the seaward boundary of the lands would become fixed as of the date of the government's conveyance, not as of the date of statehood.

The theoretical basis for the distinction arises, of course, from the property clause of the federal constitution which gives Congress the power to make "all needful Rules and Regulations" respecting property belonging to the United States. U.S. Const. art. 4, § 3, cl. 2. The moving boundary rule, being applicable law prior to statehood, remains applicable law after statehood because Congress has not acted to change it.

2. We disagree with the government's statement that, "The precise question considered by the courts below and presented by the petition here is whether the physical limits of property conveyed under a federal patent can be altered by State law." *Memorandum*, p. 6. The state has never contended, and no court below has held, that the state constitution operates to divest any owner of accreted land, title to which has vested before statehood under the law applicable at the time the accretion was formed. The state fixed boundary rule merely operates to extinquish the upland owner's common law right to acquire future title to lands not yet formed. Indeed, we would suppose that not even Congress could alter the physical limits of property already conveyed under a federal patent.

There is nothing startling in the assertion by the State of Washington that it can modify the common law incidents of real property ownership. Prior to the adoption of Initiative Measure No. 208 in 1961, Washington did not recognize joint tenancies in real property. Wash. Laws of 1961, ch. 2 (ch. 64.28 Rev. Code Wash.). Even now the incidents of joint tenancy are not necessarily the same as the common law incidents. See. *e.g.*, Griffith, *Joint Tenancy and Community Property*, 37 Wash. L. Rev. 30-43 (1962). Similarly, Washington has never recognized the common law incidents of real property ownership by husband and wife. This state, instead, adopted the community property concept from the Spanish law. Ch. 26.16 Rev. Code Wash.

It cannot be seriously argued that these laws, being changes in the common law, are not operative because all real estate in Washington was once owned by the federal government. They, like any number of other changes in the common law of real property, are nothing more than an exercise by the state of its inherent power to enact law.

3. When Washington was admitted to the Union as a state it became owner of all tidelands within its boundaries. Its ownership was not by grant or conveyance from the federal government but arose entirely as an incident of state sovereignty. *Pollard v. Hagan*, 3 How. 212, 230 (1845). We see nothing in this fact to sustain the government's argument, *Memorandum*, pp. 7, 9, that the state is therefore powerless to modify the common law moving boundary rule as to these tidelands.

On the contrary, under the doctrine of *Pollard v. Hagan* the state must be admitted on an equal footing with the original thirteen states, *Coyle v. Oklahoma*, 221 U.S. 559, 567 (1911), and is therefore guaranteed the same rights as the original states in controlling the rights and incidents in tidelands. *Hardin v. Jordan*, 140 U.S. 371, 382 (1891); *Shively v. Bowlby*, 152 U.S. 1, 40 (1894); *Mann v. Tacoma Land Co.*, 153 U.S. 273, 283-84 (1894); *McGilvra v. Ross*, 215 U.S. 70, 79 (1909); *Port of Seattle v. Oregon & Wash. R.R.*, 255 U.S. 56, 63 (1921).

Unless this Court is going to hold that the orig-

inal thirteen states are barred from adopting a fixed boundary rule for their tidelands, there is no basis for denying to the State of Washington this right as to its tidelands.[3] Of course neither the original thirteen states nor the State of Washington can modify the common law retroactively. Both must take the tideline boundary as it exists on the day the law is made, and this is what Washington has done, as we have seen, *supra*, pp. 5, 7.

4. When the government issues a land patent there is no principle of federal law that raises the common law incidents of riparian ownership to the status of immutable attributes of the title acquired, forever free from the possibility of change by the state. In fact, just the opposite is true. This Court long ago ruled, *Water Power Co. v. Water Comm'rs*, 168 U.S. 349, 363 (1897):

> It does not impair the efficacy of the grant or the use and enjoyment of the property by the grantee to hold that riparian rights are to be decided by the state courts, inasmuch as the grant, if by the Federal Government, has been held in the cases already cited, not to include title over navigable waters within or bound by the States.

It therefore is not possible to construe the patent to

---

[3] At this point we note parenthetically that the Court has in the past referred to the right of "future accretion" as vested. See *County of St. Clair v. Lovingston*, 32 Wall. 46, 68 (1874). But the case has never been understood as holding that the common law once adopted may never be later modified, *e.g.*, *Western Pac. Ry. v. Southern Pac. Co.*, 151 Fed. 376, 399-400 (9th Cir. 1907) and cases cited, because the Court's statement was intended only to meet the argument that specific federal patents were to be construed as conveying property of fixed limits as under the *agri limitati* of civil law.

petitioner's predecessor in interest as an attempt by the government to convey a vested right to an ambulatory seaward boundary,[4] as the United States suggests, *Memorandum*, pp. 3, 9, 10.

We can emphasize our point by reference to the common law incidents of riparian ownership that are left to state determination. *First*, a state can deny or permit, or permit on terms of its own choosing, access to navigable water. *Port of Seattle v. Oregon & Wash. R.R.*, 255 U.S. 56, 64 (1921), citing with approval *Lownsdale v. Grays Harbor Boom Co.*, 54 Wash. 542, 103 Pac. 833 (1909). *Second*, a state can determine the use riparians may make of the water that flows by their property. *Water Power Co. v. Water Comm'rs*, *supra*. *Third*, the government concedes that a state may abolish the riparian right to wharf out and fill. *Memorandum*, p. 8.

If a state has complete freedom to do as it chooses with regard to the rights that make waterfront ownership valuable—rights of access, use of the water, wharfage, etc.—what reason is there for doubting its power to modify the common law accretion rule? Clearly the important consideration underlying the accretion rule is to protect the basic rights of access and use of navigable waters. See *Lamprey v. State*, 52 Minn. 181, 53 N.W. 1139, 1142 (1893). It must follow therefore that the right to

[4] If the right were vested by the patent there is no explanation for the government's concession that the patentee has no right to have future accretions occur or to forestall its prevention, as occurs, for example, when the state fills tidelands artificially.

future accretions hardly qualifies as an "*essential* basis of right" (emphasis ours) under a federal patent within the meaning of *Borax, Ltd. v. Los* Angeles, 296 U.S. 10 (1935).

CONCLUSION

For the foregoing reasons we urge the Court to deny the petition for certiorari despite the recommendation of the United States.

Respectfully submitted,

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Assistant Attorneys General,

Counsel for Respondent.

December 1966

APPENDIX A

THE UNITED STATES OF AMERICA,

CERTIFICATE
No. 455

To all to whom these presents shall come, Greeting:

WHEREAS, *Edwin G. Loomis, of Pacific County, Washington Territory* has deposited in the GENERAL LAND OFFICE of the United States, a Certificate of the REGISTER OF THE LAND OFFICE at *Vancouver* whereby it appears that full payment has been made by the said *Edwin G. Loomis*, according to the provisions of the Act of Congress of the 24th of April, 1820, entitled "An act making further provisions for the sale of the Public Lands," for *the Lots numbered Three and Four of Section Four in Township Eleven, North of Range Eleven West, in the District of Lands subject to sale at Vancouver, Washington Territory containing fifty nine Acres and fifty hundredths of an acre*, according to the official plat of the Survey of the said Lands, returned to the General Land Office by the SURVEYOR GENERAL, which said tracts have been purchased by the said *Edwin G. Loomis.*

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, and in conformity with the several acts of Congress in

such cases made and provided, HAVE GIVEN AND GRANTED, and by these presents DO GIVE AND GRANT, unto the said *Edwin G. Loomis* and to *his* heirs, the said tract above described: to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereto belonging, unto the said *Edwin G. Loomis* and *his* heirs and assigns forever.

IN TESTIMONY WHEREOF, I *Andrew Johnson*, PRESIDENT OF THE UNITED STATES OF AMERICA, have caused these Letters to be made PATENT, and the SEAL of the GENERAL LAND OFFICE to be hereto affixed.

GIVEN under my hand, at the City of Vancouver, the *second* day of *July*, in the year of our Lord one thousand eight hundred and *sixty six* and of the INDEPENDENCE OF THE UNITED STATES the *ninetieth*.

BY THE PRESIDENT: *Andrew Johnson*

By *Edw. D. Neill*
Secretary

J. H. Grainger
Recorder of the
General Land Office

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 15

STELLA HUGHES, PETITIONER

v.

STATE OF WASHINGTON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the Superior Court of the State of Washington, Pacific County, (R. 16–22) is unreported. The majority and dissenting opinions of the Supreme Court of the State of Washington (R. 22–48) are reported at 67 Wn. 2d 799, 410 P. 2d 20.

JURISDICTION

The judgment of the Washington Supreme Court was entered on January 20, 1966. A petition for rehearing was denied on April 14, 1966 (R. 63). The petition for a writ of certiorari was filed on July 12, 1966, and was granted on January 9, 1967 (R. 65; 385 U.S. 1000). The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether a State may alter the ambulatory boundary between its tidelands and uplands patented by the United States prior to statehood by declaring that boundary to be permanently fixed at the line of "ordinary high tide" on the date of admission to statehood, thereby depriving the upland owner of gradual, natural accretions occurring since that date.

STATEMENT

Petitioner is the owner of littoral land on the coast of Washington, under a patent issued by the United States before admission of Washington to the Union as a State. R. 7, 23.[1] The United States surveyed the land and meandered the coast line in 1859; since then the shore line has extended westward by gradual, natural accretion, both before and after admission of

[1] Records of the Bureau of Land Management, not included in the record in this case, disclose that the original federal patent on which petitioner relies (R. 2) was issued to Edwin G. Loomis July 2, 1866. The patent described the lands as—"* * * the Lots numbered three and four of Section Four in Township Eleven, North, of Range Eleven, West, in the District of lands subject to sale at Vancouver, Washington Territory containing fifty nine acres and fifty hundredths of an acre according to the official plat of the Survey of the said Lands, returned to the General Land Office by the SURVEYOR GENERAL * * *."

The plat of the survey shows the lots as bounded on the west by the shore of the Pacific Ocean, represented by a slightly irregular but substantially straight line running almost due north and south. The field notes of the survey indicate that the surveyor ran the section lines westward to "a bank 6 or 8 feet high," and meandered the shore line by a series of straight lines connecting those intersection points.

Washington to statehood in 1889. R. 8, 23. Petitioner sued the State to quiet her title to the area bounded by the "line of ordinary high tide" (R. 2–3). The State answered, conceding petitioner's title to all accretions formed before Washington's admission to the Union on November 11, 1889, but asserting title to all subsequent accretions. Specifically, the State alleged that the dividing line "is the line of ordinary high tide as it existed on that date, [which] is the line which the water impressed upon the soil by covering it for sufficient periods to deprive the soil of vegetation as of that date" (R. 4–5).

The trial court sustained the petitioner's title to the area landward of the mean high water line, defined as the line where the shore as it exists at any particular time is intersected by the average elevation of all high tides as observed through a complete tidal cycle of 18.6 years. R. 7–10. The Supreme Court of Washington reversed, holding that the issue was controlled by State law, which had frozen the boundary as of the date of Washington's admission to the Union, November 11, 1889. R. 22–42.[2] Two justices dissented. R. 42–48.

Following the filing of the petition for a writ of certiorari, this Court invited the Solicitor General to file a brief expressing the views of the United States

[2] While clearly holding that the boundary between tidelands and uplands is permanently fixed as of November 11, 1889, the opinion below is perhaps less clear in indicating which line the boundary follows—*i.e.*, whether it is the 1889 line of vegetation suggested by respondent or the 1889 line of mean high tide recognized by federal law (see *Borax, Ltd.* v. *Los Angeles*, 296 U.S. 10, 27) and adopted by the trial court (R. 7–8). Con-

(385 U.S. 807). In response to that invitation we filed a memorandum in November 1966 pointing out that the decision below divests federal patentees of property rights conveyed by the United States in the past, curtails the nature of the title to realty that the United States may convey in the future, and conflicts with numerous decisions of this Court; we urged that certiorari be granted.[3]

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trary to respondent (Br. in Opp. p. 9), we read the decision below as accepting the trial court's high tide line, rejecting only the trial court's conclusion that the boundary line remained ambulatory after November 11, 1889. Thus the majority opinion (R. 35) first defines the phrase "ordinary high tide" as "the average of all high tides during the tidal cycle"—a definition identical to that given "mean high tide" in *Borax*, *supra*—and then concludes (R. 41–42) that "[t]he property line is the line of ordinary high tide, which we equate to *mean high tide*" on November 11, 1889 (emphasis added). Moreover, the adoption of a line-of-vegetation rule would unmistakably involve a taking of the land lying between the vegetation line and the mean high tide line. While the record does not disclose the distance between those lines in 1889, they were 386 feet apart in 1963 (R. 26). Nothing in the decision below suggests that the court approved any such confiscation.

Since we understand the decision below as rejecting respondent's line-of-vegetation contention, we confine our discussion in this brief to the accretion question. We note, however, that if we are correct in believing that the boundary is determined by federal law, then the court below was clearly required to apply the mean high tide line as defined in *Borax*. The line-of-vegetation rule is properly applicable only to nontidal waters, where no absolute mean high-water level can be established. *E.g.*, *Borough of Ford City* v. *United States*, 345 F. 2d 645 (C.A. 3), certiorari denied, 382 U.S. 902.

[3] We also noted in our memorandum that, according to the records of the Department of the Interior, the public and acquired lands of the United States stretch along 215 miles of the Washington coast and include substantial tracts of land held in trust for Indians.

ARGUMENT

INTRODUCTION AND SUMMARY

This controversy is a boundary dispute between two grantees of the United States. In Washington, as in other Western States, "the Federal Government was the initial proprietor * * * and any claim by a State or by others must derive from the federal title." *United States* v. *Grand River Dam Authority,* 363 U.S. 229, 235; *Shively* v. *Bowlby,* 152 U.S. 1, 50–51. The State concedes (R. 6) and both courts below recognized (R. 7, 23) that petitioner's title originated in a federal patent issued before Washington was admitted to statehood. It can hardly be doubted that the nature and extent of the title conveyed by that patent was, in the first instance at least, determined by federal law. We show in Point I (*infra,* pp. 7–11) that, under a long line of decisions of this Court, the seaward boundary of federally patented littoral land is deemed to be the line of mean high tide as continuously modified by the gradual, natural processes of accretion and erosion. Pursuant to this rule, which is derived from the English common law, the right to future accretions has been held "an inherent and essential attribute of the original property" and has been likened to the right "of the owner of a tree to its fruits," *County of St. Clair* v. *Lovingston,* 23 Wall. 46, 68–69. In light of this well settled rule, the State concedes (R. 23–24) that the right to accretions was enjoyed by petitioner's predecessors in title from the time the patent issued up to Washington's admission to the Union in 1889.

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Upon admission to the Union, Washington received from the federal government title to the tidelands and to the beds of navigable rivers and lakes and other inland waters within the State. We show in Point II (*infra,* pp. 12–16) that the tidelands thus obtained by the State had an ambulatory landward boundary that was identical with the seaward boundary of the littoral lands previously patented. Title to tidelands was transferred to the State by virtue of its constitutional right to stand on an equal footing with the original States as regards the attributes of sovereignty. Since the original States succeeded to the tidelands previously held by the English Crown, this Court has held that States subsequently admitted to the Union receive a like title to their tidelands. *Pollard* v. *Hagan,* 3 How. 212. The determination of which lands were thus transferred to Washington and which were retained by the federal government clearly could not be controlled by Washington law. *United States* v. *Oregon,* 295 U.S. 1. Rather, the common law rule governing the sovereign's title to tidelands, as absorbed by the original States and reaffirmed by this Court, has of necessity become the yardstick of the title obtained by Washington and all the other States admitted after the formation of the Union. That yardstick undeniably lays out an ambulatory boundary on the landward side of the State's tidelands.

We also show (*infra,* pp. 12–13) that the court below was mistaken in supposing that, upon the establishment of Washington as a State, State law superseded federal law as the law controlling petitioner's rights

under a federal patent. Even after statehood, "[t]the question * * * as to the limit of the land conveyed [by a federal patent], or the boundary between the upland and the tideland, is necessarily a federal question." *Borax, Ltd.* v. *Los Angeles,* 296 U.S. 10, 22.

Finally, we show in Point III (*infra,* pp. 16–22), that the right to future accretions as initially conveyed by federal patent, has not been effectively terminated by the State subsequent to Washington's statehood. While that right could unquestionably be terminated through the State's power of eminent domain, that power has not been invoked here. Rather, the State has proceeded on the mistaken premise that the right to accretions is a mere license in the littoral owner to utilize the tidelands which, like the right to wharf out, may be revoked at will by the tideland owner. That premise involves a misunderstanding of the right to accretions which, under federal law, is a consequence of a boundary defined in terms of the mean high tide line and, hence, entails no intrusion upon the tidelands. We therefore conclude that the decision below authorizes an impermissible taking of a vested right without compensation.

I. UNDER FEDERAL LAW, A PATENT OF LITTORAL PROPERTY CONVEYS TO AN AMBULATORY SEAWARD BOUNDARY AND HENCE VESTS A RIGHT TO FUTURE ACCRETIONS

Numerous decisions of this Court make it abundantly clear that a federal patentee of land adjacent to navigable waters, including littoral land on lakes or seashores, as well as riparian land on navigable rivers, holds "a vested right" to future accretions upon the

shore as "an inherent and essential attribute of the original property." *County of St. Clair* v. *Lovingston,* 23 Wall. 46, 68–69. This doctrine that gradual, natural accretions or erosions operate to shift the boundary between upland and tideland was derived from the common law of England where it was well-settled as applied to lands adjacent to tidal waters.[4] It was widely accepted in the thirteen original States[5] and has been consistently applied by this Court in delimiting the rights of federal patentees.

Thus, as early as 1855 the Court explained in *Jones* v. *Johnston,* 18 How. 150, 155, that alluvion deposited on the shore of Lake Michigan necessarily fell within the shifting boundary of the littoral property:

> If the call for the southern boundary, instead of being a lake, which is a shifting line, had been a permanent object, such as a street or wall, there could not be two opinions as to the location. And yet the water-line, though it may gradually and imperceptibly change, is just as fixed a boundary in the eye of the law as the former. * * *

The Court concluded (18 How. at 156): "Land gained from the sea either by alluvion or dereliction, if the same be by little and little, by small and imperceptible

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[4] 2 Blackstone, *Commentaries*, 261; 2 Bracton, *Laws and Customs of England* (1569), c. 2 (vol. 1, p. 69, Twiss ed. 1878); 2 Roll. Abr. 170 (1668); 3 Dyer, 326 (b), 73 Engl. Rep. 737–738; *Scratton* v. *Brown*, 4 Barn. & C. 485, 107 Eng. Rep. 1140 (K.B. 1825); *The King* v. *Lord Yarborough*, 2 Bligh N.S. 147, 4 Eng. Rep. 1087 (H.L. 1828).

[5] See generally Gould, *Law of Waters* (3d ed. 1900) §§ 155–157, pp. 306–314.

degrees, belongs to the owner of the land adjoining. 2 Bl. Com. 261–2." And the same principle was applied in *Jefferis* v. *East Omaha Land Co.*, 134 U.S. 178, involving accretion to a lot surveyed and platted by a public land survey which showed the lot as bounded by the meander line[6] of the Missouri River. The Court there held that the land conveyed by the original patent and subsequent transfers, which—like the patent to petitioner's predecessor—designated the lot

[6] In surveying parlance, a meander line is an approximate representation of the edge of a body of water, it being understood that the actual water line is the true boundary. In *Railroad Company* v. *Schurmeir*, 7 Wall. 272, 286–287, and again in *Jefferis*, *supra*, 134 U.S. at 196, this Court observed:

"Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser.

"In preparing the official plat from the field-notes, the meander-line is represented as the border-line of the stream, and shows, to a demonstration, that the water-course, and not the meander-line, as actually run on the land, is the boundary." See, also, *United States* v. *Lane*, 260 U.S. 662.

Solely in the interest of completeness, we also note that in some relatively rare circumstances a purported meander line may be held to establish a boundary line—for example, where through fraud or gross mistake, the line has been run where actually there was no corresponding water line (*Security Land & Exploration Co.* v. *Burns*, 193 U.S. 167, 181–182; *Jeems Bayou Club* v. *United States*, 260 U.S. 561, 564) or where there has been such extensive accretion or reliction between the time of the survey and the time of the patent that the meander line no longer represents a water line on the latter date (*Madison* v. *Basart*, 59 I.D. 415 (1947); *R. M. Stricker*, 50 I.D. 357 (1924)). Such situations are unusual, and we have no reason to believe that the present case is among them.

by its survey number, was bounded by the water line so that all accretions altering the water line were included as part of the lot and belonged to the successive transferees of the lot. The Court referred to *Jones* v. *Johnston,* 18 How. 150, *supra,* saying (134 U.S. at 196)—

> * * * that case holds that a water line, which is a shifting line and may gradually and imperceptibly change, is just as fixed a boundary in the eye of the law as a permanent object, such as a street or a wall; and it justifies the view announced by the Circuit Court in its opinion, that where a water line is the boundary of a given lot, that line, no matter how it shifts, remains the boundary, and a deed describing the lot by number or name conveys the land up to such shifting line exactly as it does up to a fixed side line.

To be sure, it has been recognized that the owner of the tidelands may deny the littoral owner any right to utilize—by constructing wharves or otherwise—the submerged lands while they remain below the ordinary high tide line (see *Port of Seattle* v. *Oregon & W. R.R.,* 255 U.S. 56, 64; *United States* v. *Smoot Sand & Gravel Corp.,* 248 F. 2d 822, 826 (C.A. 4)) and may prevent the occurrence of accretion by artificially filling in the tideland or building breakwaters or the like.[7]

[7] Artificial fill does not change the legal character of the lands filled. *United States* v. *Mission Rock Co.,* 189 U.S. 391; *United States* v. *Turner,* 175 F. 2d 644, 647 (C.A. 5), *certiorari denied,* 338 U.S. 851.

See *Stevens* v. *Arnold,* 262 U.S. 266, 269–270. But the basic rule remains that when and if accretions do occur they fall within the boundary of the littoral owner (see *Shively* v. *Bowlby,* 152 U.S. 1, 35).[8]

Against this background of federal common law, it cannot be doubted that the patent to petitioner's predecessor in title—issued prior to Washington's statehood—must be understood to have conveyed an ambulatory seaward boundary—*i.e.,* a boundary that would move westward as accretions caused the line of mean high tide to recede (or eastward as erosion occurred). Indeed, it is conceded (R. 23–24) that the right to accretions was enjoyed from the time the patent issued up to November 11, 1889, when Washington was admitted to the Union. We proceed to show that the establishment of the State's sovereignty in no way altered the applicable law.

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[8] We speak here of cases like the present one, where the boundary between upland and tideland titles has been created and defined by federal law. If both titles were to become merged in a common ownership, the owner would of course be free to subdivide his property again along any sort of boundary he chose to describe. Analogously, Washington, as owner of tidelands and shorelands (the latter defined as the area between high- and low-water lines on non-tidal waters) and also of the submerged lands beyond them, has provided that its grants of tidelands or shorelands will not include subsequent accretions to the tidelands or shorelands—that is, areas that change from wholly submerged lands to tidelands or shorelands. Wash. Laws 1897, c. 89, § 51, as amended by Laws, 1899, c. 83, § 1 (now R.C.W. 79.01.492), explained in *Ghione* v. *State,* 26 Wash. 2d 635, 651, 175 P. 2d 955, 965, and quoted by the court below, R. 31.

II. NEITHER THE ESTABLISHMENT OF WASHINGTON AS A STATE NOR THE STATE'S ACQUISITION OF TITLE TO THE TIDELANDS ALTERED THE NATURE OF THE BOUNDARY OF FEDERALLY PATENTED LITTORAL LANDS

Upon admission to the Union the State of Washington became the owner of the tidelands within its boundaries. But neither the establishment of State sovereignty nor the State's acquisition of title to the tidelands affected the boundary between the tidelands and federally owned or patented uplands.

We note first that the establishment of a State government in Washington did not affect the principle that the rights conveyed by a federal patent are determined by federal law. That proposition was spelled out with clarity in *Borax, Ltd.* v. *Los Angeles,* 296 U.S. 10. The Court there held that the boundary between a grantee of the State's tideland and a post-statehood federal patentee of the adjacent littoral land was the line of mean high tide in accordance with federal law. In concluding that the issue was controlled by federal rather than State law, the Court said (296 U.S. at 22):

> Petitioners claim under a federal patent which, according to the plat, purported to convey land bordering on the Pacific Ocean. There is no question that the United States was free to convey the upland, and the patent affords no ground for holding that it did not convey all the title that the United States had in the premises. The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question.

> It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law. *Packer* v. *Bird,* 137 U.S. 661, 669, 670; *Brewer-Elliott Oil Co.* v. *United States,* 260 U.S. 77, 87; *United States* v. *Holt Bank,* 270 U.S. 49, 55, 56; *United States* v. *Utah,* 283 U.S. 64, 75. Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law. *Barney* v. *Keokuk,* 94 U.S. 324, 338; *Shively* v. *Bowlby, supra,* p. 40; *Hardin* v. *Jordan,* 140 U.S. 371, 382; *Port of Seattle* v. *Oregon & Washington R. Co.,* 255 U.S. 56, 63.

The decision in *Borax* was held to be dispositive in *United States* v. *Washington,* 294 F. 2d 830 (C.A. 9), certiorari denied, 369 U.S. 817, which presented the very issue to be decided here. The United States, holding legal title to littoral land subject to a trust patent to an Indian, sued the State to establish title to accretions. The Court of Appeals for the Ninth Circuit held that under *Borax* "the question of whether imperceptible accretions go with the upland [must] be determined in accordance with federal law when title to the uplands is in or derived from the federal government" (294 F. 2d at 833–834). Accordingly, the court rejected the State's contention that, under State law, the boundary between upland and tideland was frozen as of 1889.

In sum, the fact of Washington's sovereignty does not in itself alter the controlling significance of federal law in construing a federal patent. There is, therefore, no validity in the view expressed by the

court below that "the rules applied" by the federal courts "do not override the established rules of property of the sovereign state in a controversy between it and one of its citizens" (R. 41). Nor does the State's proprietary title to its tidelands—acquired upon admission to the Union—in any way alter the nature of the seaward boundary of petitioner's littoral land. Washington's title to its tidelands and the beds of its inland navigable waters—like petitioner's title to her uplands—is derived from the federal government and is measured by federal law. While petitioner traces her title to a specific grant, the State's title derives from the constitutional imperative of the equal-footing doctrine as construed by this Court in *Pollard* v. *Hogan*, 3 How. 212.[9] The Court there held that, inasmuch as the original States had, as an attribute of their sovereignty, acquired title to tidelands previously held by the British Crown,[10] States subsequently created out of federal territories receive

[9] Those decisions of this Court holding that the location of littoral or riparian boundaries did not present a federal question have involved situations where the boundary was created by one of the original States or a prior sovereign, *Joy* v. *City of St. Louis*, 122 Fed. 524 (C.C. E.D. Mo.), affirmed, 201 U.S. 332; *Ker* v. *Couden*, 223 U.S. 268; see *Stevens* v. *Arnold*, 262 U.S. 266, 270; *Borax, Ltd.* v. *Los Angeles*, 296 U.S. 10, 15–16; or where new land resulted from a sudden or artificial deposit and so belonged to the State under federal law unless the State chose to relinquish it, *Barney* v. *Keokuk*, 94 U.S. 324, 337; *St. Louis* v. *Rutz*, 138 U.S. 226, 251; or where the question was whether State law had augmented the littoral or riparian owner's federal grant by relinquishing some State right in lands below the high-water line, *Packer* v. *Bird*, 137 U.S. 661, 669.

[10] See *Martin* v. *Waddell*, 16 Pet. 367, 410, 418.

a like title by virtue of the principle that all States must stand on an equal footing as regards the attributes of sovereignty.[11] By way of contrast, title to the very extensive federally owned uplands in the western territories was not automatically transferred to the newly created States since title to such property has not been deemed an attribute of sovereignty. See *United States* v. *Texas,* 339 U.S. 707, 716.[12]

The question of which lands are and which lands are not transferred from federal ownership to the newly created States is necessarily a federal question. "The laws of the United States alone control the disposition of title to its lands." *United States* v. *Oregon,* 295 U.S. 1, 27–28; *Brewer-Elliott Oil Co.* v. *United States,* 260 U.S. 77, 87–89. Accordingly, the extent of the tidelands received by Washington in 1889 is determined by federal rather than State law. Since, as we have shown above (*supra,* pp. 7–11), federal law establishes a boundary between tidelands and uplands in terms of the line of mean high tide, the landward boundary of Washington's tidelands, like the seaward boundary of petitioner's uplands,

[11] In *Shively* v. *Bowlby,* 152 U.S. 1, 27–28, the Court rejected the contention that the *Pollard* decision rested simply on the express "equal footing" requirement of the deed of cession by which Georgia had conveyed the Alabama territory to the United States for the creation of future states.

[12] This distinction between tidelands and uplands is preserved in the Submerged Lands Act. So far as the Act bears on tidelands, Congress merely confirmed each State's title to submerged lands "up to but not above the line of mean high tide" (Sections 2(a)(2) and 3(a), 43 U.S.C. 1301(a)(2) and 1311(a)).

is an ambulatory boundary reflecting the continuous natural processes of accretion and erosion. Indeed, since Washington received its title by virtue of its constitutional right to stand on an equal footing with the original States, the fact that those States, in succeeding to the title of the English Crown, received an ambulatory boundary to their tidelands demonstrates that Washington could receive no more. *United States* v. *Texas*, 339 U.S. 707, 717.

III. THE DECISION BELOW AUTHORIZES AN IMPERMISSIBLE TAKING OF PROPERTY

We have just shown that the ambulatory boundary, *i.e.*, the right to accretions, conveyed by a federal patent was not affected by Washington's admission to the Union. The remaining question, therefore, is whether the State could effectively terminate that right.

If we understand it correctly, the court below found the source of a supervening State rule of law in Article 17 of the State constitution, adopted in October, 1889. That article provides:

> §.1 DECLARATION OF STATE OWNERSHIP. The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: Provided, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state.

> § 2 DISCLAIMER OF CERTAIN LANDS. The state of Washington disclaims all title in and claim to all tide, swamp and overflowed lands, patented by the United States: Provided, the same is not impeached for fraud.

This "constitutional assertion of state ownership," the court found, "is clear and unambiguous" (R. 38).[18] The court concluded that "[t]he state's constitutional assertion of ownership in 1889 terminated any rights the upland owner may have had to future accretion. Thereafter, the possible rights of an upland owner are those that might be established by the legislature" (R. 40). This seeming confiscation is not explained as an exercise of the State's police power, as protective of any public interest, nor by invocation of eminent domain. Rather, it is explained merely in terms of the State's power to remake the law of real property.

Apparently recognizing that a State cannot, merely by asserting its sovereign power to make law, confiscate outstanding property rights, the court pro-

[18] This asserted lack of ambiguity is somewhat belied by the court's conclusion that the same constitutional provision that created an immoveable boundary on tidewater created an ambulatory one on nontidal waters. See R. 40–41, approving and distinguishing *Ghione* v. *State*, 26 Wash. 2d 635, 175 P. 2d 955 (1946). The subsequent enactments of the Washington legislature cited by the court (R. 30–33) do not point in the direction of the court's conclusion, and the court does not suggest that they operated retroactively to divest upland owners of post-1889 accretions. Were the issue open here, we would urge that the constitutional and statutory provisions relied on by the court cannot conceivably sustain the conclusion it reached. See Corker, *Where Does the Beach Begin, and to What Extent is this a Federal Question*, 42 Wash. L. Rev. 33, 77–88 (1966).

ceeded on the thesis that littoral owners such as petitioner have no vested right to such future accretions as may occur. Thus the court quoted its prior decision in *Eisenbach* v. *Hatfield,* 2 Wash. 236, 250, 26 Pac. 539, 543, where it said in dictum (emphasis added):

> But we are unable to see how one can have a *present* vested right to that which does not exist and which may never have an existence.

From this premise the court apparently concluded that the State's assertion of a fixed boundary does not divest littoral owners of any protected right. The thesis is fallacious.

First, while accretion may or may not occur in the future, a federal patent to littoral land conveys a present right to a boundary at the mean high tide line.[14] Second, both vested and contingent future interests in property are commonplace; on the court's premise the property rights of remaindermen may be seized by any State without compensation merely because possession is prospective. Third, this Court has held that the right to future accretions is "a vested right" like "that of the owner of a tree to its fruits." *County of St. Clair* v. *Lovingston,* 23 Wall. 46, 68–69. Finally, the court fails to recognize the distinction between rights of littoral owners to utilize the State's tidelands, as by

[14] The *Eisenbach* case involved the States' right to deny to a littoral owner any rights, such as wharfage, in adjacent tidelands *while they were still submerged.* In that context, the court quite correctly observed that it was only concerned with "the power of the state to deal with its own property" (2 Wash. at 253, 26 Pac. at 544). Here, however, where the disputed land has emerged from the sea, whether the land is the State's "own property" is the very question to be decided.

wharfing out, and the right to alluvion emerging above the line of mean high tide and therefore not lying within the State's tidelands. As this Court observed in *Stevens* v. *Arnold,* 262 U.S. 266, 270, "by the common law the right of accretion is not like the permissive right to use land still under water, but is a right as against the State as well as its grantees [of tidelands], when as here the grantees have not filled in the land." In sum, the right to accretions is not a license to invade tidelands that the State may revoke at will; it is rather the consequence of a boundary defined in terms of the mean high tide line, and as such, entails no intrusion upon the tidelands.

This Court has in the past had occasion to strike down similar attempts by States to obtain property by modifying rights established under federal law. Thus, in *Brewer-Elliott Oil Co.* v. *United States,* 260 U.S. 77, where the United States, before Oklahoma statehood, granted to the Osage Indians a tract of land extending to the main channel of the Arkansas River, the State was not allowed, by adopting a loose definition of navigability, to claim the riverbed portion of the grant under the *Pollard* v. *Hagan* rule. The Court explained (260 U.S. at 87–88):

> As to such a grant, the judgment of the state court does not bind us, for the validity and effect of an act done by the United States is necessarily a federal question. The title of the Indians grows out of a federal grant when the Federal Government had complete sovereignty over the territory in question. Oklahoma when she came into the Union took sovereignty over

> the public lands in the condition of ownership as they were then, and, if the bed of a non-navigable stream had then become the property of the Osages, there was nothing in the admission of Oklahoma into a constitutional equality of power with other States which required or permitted a divesting of the title. It is not for a State by courts or legislature, in dealing with the general subject of beds of streams, to adopt a retroactive rule for determining navigability which would destroy a title already accrued under federal law and grant or would enlarge what actually passed to the State, at the time of her admission, under the constitutional rule of equality here invoked.

The Court also pointed out that even if the river had been navigable by federal standards, the United States would have had power to make such a grant of river-bed lands before statehood (260 U.S. at 83–84); and that even though the effect of federal grants is presumed to be determined by local rules, where no contrary intent appears, those rules cannot "impair the efficacy of the grant or the use and enjoyment of the property by the grantee" (260 U.S. at 88).

In *United States* v. *Oregon,* 295 U.S. 1, the Court considered an Oregon statute of 1921 declaring that all lakes meandered in the federal surveys were to be deemed navigable and that title to the land under them, not previously granted by the State, "is hereby declared to be in the State of Oregon, and the State of Oregon hereby asserts and declares its sovereignty over the same and its ownership thereof." 295 U.S. at 26. The State's contention, as stated by the Court, was

that "upon grant of the uplands by the United States, whether to the State or others, title to the adjacent lake beds vested in the State by operation of the statute." *Ibid.* The Court rejected that argument, holding (*id.* at 29):

> * * * The case is not one of the reasonable construction of grants of the United States, but the attempted forfeiture to the State by legislative fiat of lands which, so far as they have not passed to the individual upland proprietors, remain the property of the United States. Such action by the State can no more affect the title of the United States than can the similar legislative pronouncements that streams within a State are navigable which this Court has found to be non-navigable.

We do not question the State's right to acquire accreted property or to acquire the right to future accretions by eminent domain, making just compensation for the interest taken. Nor do we question the State's right to impose regulations on the use to which the property of federal patentees may be put, as by zoning. The State is certainly free to augment the rights of littoral owners by relinquishing some aspect of its own tideland title. See *Barney* v. *Keokuk,* 94 U.S. 324, 338; *Shively* v. *Bowlby,* 152 U.S. 1, 40–47; *Packer* v. *Bird,* 137 U.S. 661, 669.[15] Likewise the State, when it has acquired littoral property, is free to grant it to

[15] Similarly, the United States, in relinquishing to the States its title to the continental shelf, could establish whatever outer boundary it chose. See *United States* v. *Louisiana*, 363 U.S. 1, 20; and see the brief for the United States filed this Term in that case (No. 9, Original), at p. 15.

others under such terms as it chooses and thus may withhold from its grantees the right to future accretions (see n. 8, *supra*, p. 11). But none of these considerations are present here. We see no escape from the conclusion that this case involves an uncompensated and impermissible taking by the State of the property of its neighbors.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Washington should be reversed and the judgment of the trial court affirmed.

Respectfully submitted.

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 15

STELLA HUGHES
Petitioner

v.

STATE OF WASHINGTON
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF WASHINGTON

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

This court has granted a petition for writ of certiorari to review the judgment of the Supreme Court of the State of Washington in its cause No. 37,583, **Hughes v. Washington**, entered on January 20, 1966, and published in the official reports as 67 Wn. 2d 799; 410 P. 2d 20 (R. 22-48). A petition for rehearing was

filed within thirty days (R. 48-56) and denied on April 14, 1966, without opinion, and on the same date the remittitur was sent down to the trial court (R. 63-65). The judgment of the trial court, the Superior Court of the State of Washington for Pacific County, in its cause No. 14,546, is unreported but printed herein (R. 16-17; 9-10).

Jurisdiction

The jurisdiction of this court is invoked under 28 U.S.C. Section 1257 (3) reading as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The review of this case also presents a situation governed by Rule 19 of this court:

> "Where a state court has decided a federal question of substance * * * in a way probably not in accord with the applicable decisions of this court."

The Supreme Court of the State of Washington filed its remittitur on April 14, 1966, and the same was sent down to the trial court on that date (R. 64), and within ninety days thereafter, to-wit: July 11, 1966, a

petition herein for writ of certiorari was filed in this court pursuant to Rule 22 of this court. The decision of the Supreme Court of the State of Washington was filed on January 20, 1966, but did not become final until the order denying a petition for rehearing was filed and the remittitur sent down. Rules on Appeal 50 of the Washington Supreme Court provide:

> "Every petition for rehearing shall be filed within thirty days after the opinion in the cause has been filed . . . The filing of a petition for rehearing shall suspend the decision of the court until the cause is finally determined."

An order of this court granting petitioner's writ was entered January 9, 1967.

Statute or Right Involved

No statute as such is involved in this matter, simply: "The validity and the effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law." **Borax Consolidated Ltd. v. City of Los Angeles,** 296 U.S. 10; 56 S. Ct. 23; 80 L. Ed. 9.

Question Presented

The Supreme Court of the State of Washington held in the case under review, contrary to the common law and to existing federal decisions, including a decision of this court, that since November 11, 1889, the date of Statehood, imperceptible accretions added to the

seaward boundary belong to the State, and that the dividing line between upland ownerships and State-owned tidelands is a fixed line which is the line of ordinary high tide and also the line of vegetation as it existed on November 11, 1889.

Therefore, the question is presented: Does Federal rather than State law determine title to imperceptible accretions added to ocean upland owned by one whose title is deraigned from the United States by patent prior to Statehood?

Statement

This action to quiet title was instituted in the Superior Court of the State of Washington for Pacific County by petitioner Stella Hughes as plaintiff (hereinafter referred to as "Mrs. Hughes") against respondent, State of Washington (hereinafter referred to as "State"). (R. 1-3).

Mrs. Hughes is the owner of land in that county extending to and bordering the Pacific Ocean. Her title deraigned from the United States Government by virtue of patent issued July 2, 1866, when the State of Washington was still a Territory. (R. 7, 13)

Imperceptible accretions have formed on her land to the west and ocean side. As she is upland owner, she asserts title to these accretions; further asserts that such boundary line is ambulatory, and asserts that the dividing line between her land and that of

the State tideland is the line of mean high tide as the same now or hereafter may exist. (R. 8-10)

The State claims these gradual natural accretions as of the date of Statehood, November 11, 1889, and also claims that the boundary line is a fixed line as of that date. The State, in essence, seeks to establish a new and intervening title and ownership to a strip of land between the Hughes property and the mean high tide of the Pacific Ocean as it now exists. (R. 3-5) Title to this intervening strip is not academic, but of substance, as may be seen by the following compiled map.

The lower court entered judgment in favor of Mrs. Hughes quieting title to her land as follows:

> "The western boundary of which is the line of mean high tide of the Pacific Ocean as it now or hereafter may exist, which line is the average elevation of all high tides as observed at a location through a complete tidal cycle of 18.6 years, free and clear of any right, title, claim or interest of the State of Washington to any lands accreted to the original donation land claim either prior or subsequent to November 11, 1889." (R. 9-10)

The State appealed and the Supreme Court of the State of Washington reversed the lower court, holding that Federal law did not govern and that all such accretions after statehood belonged to the State. (R. 12, 22-42) Petition of certiorari was timely filed in this court and granted.

Summary of Argument

The location of the boundary line between upland conveyed by the Federal government prior to statehood and State-owned tideland and the nature and extent of the rights conveyed by the government is necessarily a Federal question based on the common law, and Federal law is equally applicable when the problem is one of determining whether imperceptible accretions go with the upland.

The Federal rule on accretions is based on a long standing determination that "mean high tide" constitutes a moveable boundary line wherever in point of time, that "mean high tide" may be located, and the formula for ascertaining that line is defined as the average elevation of all high tides as observed at a location through a complete tidal cycle of 18.6 years. The opinion and judgment of the Supreme Court of the State of Washington under review not only determines the title to imperceptible natural accertions contrary to the common law and long established Federal rule, but adopts a new rule of property, a rule which is not only unsupported by authority, precedent, its own prior decisions and reason, but which has no scientific or natural basis or practical means of locating property lines and which thus leaves the rights of all property owners in a hopeless morass of uncertainty. The opinion of the State court attempts to establish its

title to tidelands on a different footing than that of the other states, and attempts to unconstitutionally deprive property owners of attributes of their title which the United States conveyed to them. Permitting this decision of the State court to stand unreversed will adversely affect the rights and interests of hundreds of ownerships bounded by tidal waters, contrary to law.

Argument

I. FEDERAL LAW CONTROLS; THE DECISION UNDER REVIEW IS CONTRARY TO FEDERAL LAW AND SHOULD BE REVERSED.

Mrs. Hughes, the petitioner, seeks review of the Washington State Supreme Court decision entitled **Hughes v. State of Washington**, 67 Wn. 2d 799, 410 P. 2d 20 (R. 22-42), for the basic reason that that court is deciding a Federal question and its decision is in direct conflct with the common law and the Federal rule as expressed by the Federal courts and this court.

Her position is that she deraigns title from a Federal patent and Federal law must control the establishment of the boundary of her property as between her upland ownership and the State-owned tideland to the west, and the Fedral law must control the method of ascertaining the boundary on the land itself.

The latest Federal decision clearly supports her basic premise. **U.S. v. State of Washington,** 294 F. 2d 830 (9th Cir., 1961, (Cert. den. 369 U.S. 817). That case involved government land also on the coast of the State of Washington with its westerly boundary extending to the Pacific Ocean, and with the State, as here, claiming ownership of imperceptible natural accretions. The sound reasoning of the opinion, written by Circuit Judge Hamley, a former member of the Washington Supreme Court, bears reptition. The opinion states, on page 832:

> "In urging that federal law controls, the Government relies primarily upon the holding Borax Consolidated, Ltd., v. Los Angeles, 296 U.S. 10. In that case Borax Consolidated, claiming as upland owner under a federal patent, brought an action to quiet title to land alleged to be tideland situated in the inner bay of Los Angeles Harbor. It was apparently agreed that the company's land extended to the high-water mark, but there was controversy as to how this mark was to be determined. Declining to be bound in its determination by the definition of the term 'ordinary high water mark' under California law, the court said:
>
> " 'The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law. Packer v. Bird, 137 U.S. 661, 669, 670; Brewer-Elliott Oil Co. v. United States, 260 U.S. 77, 87; United States v. Holt Bank, 270 U.S. 49, 55, 56; United States v. Utah, 283 U.S. 64, 75.

The opinion in **Borax Consolidated, Ltd. v. Los Angeles,** 296 U.S. 10, was written by Chief Justice Hughes in 1935, and its ruling remains unchallenged. Attempts were made by the State to lessen its authority by arguing that it was not concerned with accretions. But Judge Hamley, on page 832 of the decision states:

> "No question of accretions was involved in Borax, the problem being ascertainment of the boundary between the upland and tideland as it existed at the time the company received its patent, but the principle there announced is equally applicable where the problem is one of determining whether imperceptible accretions go with the upland. If the upland owner is entitled to the imperceptible accretions it is because this is an attribute of title reserved to or obtained by grant from the Government. Thus the determination of the attributes of an underlying federal title, quite as much as the determination of the boundaries of the land reserved or acquired under such a title, involves the ascertainment of the essential basis of a right asserted under federal law."

The court further states on page 834:

> "The common law is the source of the tideland title which the United States held and which passed to the State of Washington when it was admitted to the Union. Federal law follows the common law in determining the measure of the title to lands retained by the United States. The Supreme Court has implicitly so recognized. At common law the person whose land is bounded by sea, lake or river owns any additions thereto resulting from imperceptible accretion.
>
> "[3] In the case of tidal waters such as are involved

here, the high-water mark means the line of high water as determined by the course of the tides, not as determined by physical markings made upon the ground by the water.

◆ ◆ ◆

"* * * the definition of mean high tide is the average elevation of all high tides as observed at a location through a complete tidal cycle of 18.6 years. Borax Consolidated, Ltd. v. City of Los Angeles, supra, 296 U.S. at pages 26-27, 56 S. Ct. 23, 80 L. Ed. 9. This is an unchanging elevation, and the line of mean high tide is where that unchanging elevation meets the shore as it exists at any particular time."

Contrary to the foregoing holding, the **Hughes** decision by the Washington State court arbitrarily holds that the Washington State Constitution, statutes and decisional law change and modify the Federal rules and supersede them. Its conclusion can be stated more simply than its logic. In essence, it determines that at the time of Statehood, the boundary line between upland and state-owned tideland became fixed and unchanging by the line of ordinary high tide as of November 11, 1889; which line is equated to be the vegetation line as of that date. This, then, becomes the westward and seaward boundary of the uplands, and all imperceptible accretions added thereto became the property of the State of Washington.

Charles E. Corker, Professor of Law at the University of Washington, in an exhaustive article on this

very subject in Volume 42 Washington Law Review, pages 33-118, on page 93, points out the conflict:

> "We find no escape from the conclusion that Borax and Hughes are irreconcilable."

II. THE DECISION UNDER REVIEW IS UNSUPPORTED BY REASON, AUTHORITY OR PRECEDENT, AND ATTEMPTS TO CREATE A NEW RULE OF PROPERTY WITHOUT PRACTICAL OR RECOGNIZED MEANS OF LOCATING OR DETERMINING THE EXTENT OF SUCH PROPERTY.

The **Hughes** decision cannot be justified by either precedent or logic. The majority opinion seeks support for its holding in Article XVII of the Washington State Constitution and in its background, and also in legislative enactments, and in administrative and judicial rulings. Article XVII of the State Constitution provides:

> "1. DECLARATION OF STATE OWNERSHIP. The State of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of **ordinary high tide,** in waters where the tide ebbs and flows, and up to and including the line of **ordinary high water** within the banks of all navigable rivers and lakes; Provided, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state. (Emphasis supplied.)

"2. DISCLAIMER OF CERTAIN LANDS. The State of Washington disclaims all title in and claim to all tide, swamp and overflowed lands, patented by the United States; Provided, the same is not impeached for fraud."

The historical background of this constitutional provision sheds little light on the problem. Obviously there could have been no prior state law. The phrase "ordinary high tide" can be examined only by recourse to the common law. Apparently overlooked in the decision was the fact that the Washington Territorial Code of 1881 adopted the common law and that this code provision has been carried into the present Washington Code as **R.C.W. 4.04.010.** As has been seen, the common law doctrines applicable here were previously interpreted and established by the Federal courts.

Strangely enough, the historical background of Article XVII of the State Constitution was earlier examined by the Washington Supreme Court and a contrary result reached. The State Attorney General in **Ghione v. State of Washington,** 26 Wn. 2d 635, 175 P. 2d 955, contended then as now, that the upland owner abutting on navigable waters had no right to accretions. The court refused to so hold. So we have two cases, decided only twenty years apart, holding that the same constitutional provision has diverse meanings. The **Hughes** case does not overrule the

Ghione case, but simply denies its relevancy for the expressed reason that one affects a river and the other the ocean or bays. But the constitution refers to **all** navigable waters, and so the distinction is without logical support.

A well recognized rule of statutory construction was adopted early in the State of Washington. In **Irwin v. Rogers,** 91 Wash. 284, 287, 157 Pac. 690, the court said:

> "Where a statute uses a word which is well known and has a definite sense at common law or in the written law, without defining it, it will be presumed to be used in that sense."

If the Washington court in the **Hughes** case had followed its own pronouncement, it would necessarily have determined that the "line of ordinary high tide" in the common law sense would mean an ever moving. ambulatory line and not a fixed line with reference to the property boundaries.

The majority opinion in the **Hughes** case also examined tideland statutes passed subsequent to Statehood in connection with arriving at and trying to support its conclusion. The first tideland statute, Session Laws of 1899, Chapter 3, Section 1, page 132 (R.C.W. 79.01.492, as modified) provided:

> "* * * that any accretions that may be added to any tract or tracts of tide or shore lands heretofore sold or that may hereafter be sold by the state shall belong to the state."

This statute refers to accretions to tidelands when

sold by the State, but no such sale was made to Mrs. Hughes; and as the court itself says, on page 806:

> "This statute does not purport to determine ownership of accretions when the tidelands have not been sold."

This same statute was also interpreted by the State court in the case of **Ghione v. Washington,** 26 Wn. 2d 635, 175 P. 2d 955, and the Washington court said at pp. 650-651:

> "It is clear to us that this act does not apply to the case at bar, as the attorney general contends. The statute in its original form is perhaps confusing, but the amendment clearly shows that it does not relate to accretions in the ordinary sense of the term. that is, accretions to uplands, but, on the contrary, relates to accretions to **tide and shore lands,** and therefore, accretions, by definition, situate below the line of ordinary high tide or ordinary high water which marks the boundary **between** tide or shore land and the adjoining upland. Moreover, the statute expressly applies only to such accretions formed **after** such tide and shore lands have been sold by the state."

The Washington Court next discussed the Session Laws of 1901, Chapter 105, page 217, and Chapter 110, page 225 (R.C.W. 79.16.170, 171) which provide:

> "That the shore and beach of the Pacific Ocean, including the area or space lying, abutting or fronting on said ocean **between ordinary high tide and extreme low tide (as such shore and beach now are or hereafter may be)** from the Columbia River or Cape Disappointment on the south to a point three hundred feet southerly from the south line of the government jetty on Peterson's Point, State of Wash-

> ington on the north, be and the same, **are hereby declared a public highway forever,** and as such highway shall remain forever open to the use of the public. (Emphasis ours) .
>
> "No part of said shore or beach shall ever be sold, conveyed, leased or otherwise disposed of."

This statute simply establishes a highway on the state-owned tideland. It does not define where the line of ordinary high tide may be, nor the time nor the method by which it is to be established.

Although the Washington court in the Hughes opinion must necessarily admit the boundaries may shift and that the tide line may well change (p. 807 of Opinion; R. 32) its bootstrap reasoning is, (having decided that the land side boundary should be a fixed line), that only the line of low tide may shift. This inconsistency is best portrayed by unchanging natural law. As a boundary line at a mean elevation at low tide shifts seaward, so must the line of mean high tide also shift. The rise and fall of the tides are not a matter of judicial speculation, but of astronomical fact. Normally as the character of the land changes in height by accretion so does the unchanging elevation of the tidal plane intersect the land at different points at all tidal levels.

If, in fact, as argued, the vegetation line and the line of ordinary high tide of 1889 remains fixed, there could be no land sold by the Washington State Com-

missioner of Public Lands on the land side of the highway reservation. The Commissioner, of course, has sold some, and as Professor Corker well states in his article in 42 **Washington Law Review,** page 86:

> "The dilemma is resolved by the court's construction which gives 'ordinary high tide,' two different meanings: a fixed line in the constitution, a moving line in the 1901 statute. This leaves the Commissioner with some accretion lands to sell."

In referring to the nature of tides, the Washington court refers to **Marmer,** US. Dept. of Commerce, Coast and Geodetic Survey, Special Pub. 135, Rev. Ed. 1951, in which it is stated:

> "In view of the variations to which the height of high water is subject, mean high water (tide) at any place may be defined simply as the average height of the high water at that place over a period of 19 years." (R. 34)

It also quotes from **Shalowitz,** 1 Shore and Sea boundaries 89, United States Department of Commerce 1962 as follows:

> "Boundaries determined by the course of the tides involve two engineering aspects: a vertical one, predicated on the height reached by the tide during its vertical rise and fall, and constituting a tidal plane or datum, such as mean high water, mean low water, etc.; and a horizontal one, related to the line where the tidal plane intersects the short to form the tidal boundary desired, for example, mean high-water mark, mean low-water mark * * * The first is derived from tidal observations alone, and, once derived (on the basis of long-term observations, **is for all practical purposes a permanent one.** (R. 35)

The court then agrees with the cited authorities that "mean high tide" is measurable and determinable (p. 810 of Opinion; R. 35).

The court, however, does not follow the only scientific formula laid down by the acknowledged experts in the field, but substitutes its own definition as follows:

> "* * * On the other hand, 'the line of ordinary high tide' as used in article 17 of the constitution is not a term of technical exactness. It is indefinite at best and an oversimplification of a phenomenon inherently complex and variable. In the absence of any indication to the contrary, we deem the word 'ordinary' to be used in its everyday context." (R. 35)

It is clear, therefore, that the court discards the Coast and Geodetic Survey formula as set out in **Marmer**, and adhered to in the **Borax** case, and adopts a new definition which, in itself, is impossible to correlate with any known method of locating the line of "ordinary high tide" on the ground. Marmer states that the heights of high and low water at any place varies from day to day:

> "In the change in range from day to day, the tide reveals clearly the presence of three variations, each associated with the moon." (page 5)

and on page 6 says:

> "Since the rise and fall of the tide varies from day to day, any tidal characteristics deriving from a short period of observations may vary considerably from the average or mean values."

The rejection of the Washington court of the common law definition based on scientific determination and established precedent and the substitution of its own concept is completely unjustified, and its explanation for so doing is certainly not clear.

If the **Hughes** opinion is to stand, all coastal and tidal ownerships will be faced with the insoluble problem of determining the line of "ordinary high tide" of 1889 which is not the "mean high tide" line as set out by the Coast and Geodetic survey formula, but corresponds with the vegetation line of 1889 which is impossible to locate. The **Hughes** definition of "the line of ordinary high tide" proposes no formula for locating the same, nor can it be done from any known data.

The court also turns to administrative and unreported lower court interprtations in an effort to support its conclusion. The court says that the Washington State Commissioner of Public Lands has established the line of "ordinary high tide" where it existed in 1889 on the basis of seventy-three lower court law suits which vary in minor respects. (R. 36) All of these cases were settled in the Superior courts for Pacific and Grays Harbor Counties; none were reported and none were appealed. (R. 36)

It should be stressed that these cases, with but two exceptions, were settled by agreement between the land owner and the State. In none of these cases is

there a judicial determination of the method to be used in establishing this theoretical line. There has never been cited any official public statement by the Washington Commissioner of Public Lands stating how any private land owner may determine his western boundary—none exists. No doubt the western, or seaward boundary line presumably established by the State of Washington in 1949 (referred to as the coordinate system of land measurement (R. 36) was based on the Coast and Geodetic survey data and formula. But this we cannot know, since we are not informed. Neither are we informed by what theory or method this theoretical line is made coincidental with the vegetation line of 1889.

Inspection on the ground as of now is of little help in determining the vegetation line of 1889. It would seem apparent that engineers for the State of Washington or anyone else would be helpless in attempting to determine a line established by judicial ruling for which no precedent exists and with any physical evidence thereof having been lost in antiquity.

The Washington Supreme Court in the **Hughes** case next refers to its own prior decisions in attempting to support its conclusion. The court first refers to **Eisenbach v. Hatfield,** 2 Wash. 236, 26 Pac. 539 (1891), stating on page 813 (R. 39):

"We conclude that its ownership is resolved by the

rationale of **Eisenbach,** and that accretion formed since November 11, 1889, is an addition to state-owned property, not to upland property."

But the Eisenbach case **did not involve accretions,** and since none existed, the Eisenbach opinion refused to consider what the future might entail.

The **Eisenbach** case was later construed in **Hill v. Newell,** 86 Wash. 227, 230; 149 Pac. 951, 952 (1915), which held:

"The riparian right * * * is not a right in the bed of a stream **unless new land results from accretion, reliction or avulsion.**" (Emphasis supplied)

The court also relied on **Harbor Line Commissioners v. State, ex rel Yesler,** 2 Wash. 530, 27 Pac. 550 (1891), which simply held that the owner of the uplands had no right to build a wharf below the line of ordinary high tide. The question of accretions did not arise.

The court refers to **Washougal & LaCamas Transp. Co. v. Dalles P & A Nav. Co.,** 27 Wash. 490, 68 Pac. 74 (1902). This case holds pointedly that shore lands created by erosion do not belong to the State nor to the State's grantee. It is interesting to note that the Washington court in the foregoing case adopted the rule for which Mrs. Hughes contends here; that is, that this is a Federal question. The court in the **Washougal** case, at page 496, stated:

"What title or right passes under a grant of lands made by the United States is **a federal question,** and the judgment of a State Supreme Court is within

the appellate jurisdiction of the Federal Supreme Court." (Emphasis supplied)

The cases which were of controlling importance to any decision to be rendered by the Washington Supreme Court in the **Hughes** case and which had to be met head-on by the court were its own decision in **Ghione v. State,** 26 Wn. 2d 635, 175 P. 2d 955 (1946), the decision of the Court of Appeals for the Ninth Circuit upon essentially the same set of facts and circumstances in **United States v. Washington,** 294 F. 2d 830 (9th Cir. 1961), and the prior decision of this court in **Borax Consolidated Ltd. v. Los Angeles,** 296 U.S. 10, 80 L. Ed. 9, 56 Sup. Ct. 23 (1935).

The dissenting opinion of Judge Hill of the Washington court recognized the importance of these decisions and by giving weight to the principles which they represent concluded that there was a ridiculously short and simple solution to the problem; that Federal law was applicable; that a "shifting boundary" applied; that this was the result dictated by common law and by Federal law; that it was a plain and well-traveled legal path, that it preserved the rights of all parties to what they bargained for and established what they actually owned, and, accordingly, that the westward or seaward boundary fixed by the trial court of Pacific County should be affirmed (pp. 816-821, R.

42-48). The dissenting opinion (p. 818, R. 44), commenting on the majority opinion, further stated:

> "To arrive at the result the state desires (and the majority approved), a new, circuitous and rather devious route, rarely explored, must be followed."

The majority opinion, on the other hand, brushes off the controlling **Borax, Ghione** and **United States v. Washington** cases with a brief and ineffectual attempt to distinguish them. It asserts that **Borax** does not involve the question of accretion, but fails to come to grips with the fact that the principle pronounced in **Borax** is equally applicable in cases of accretion, as was pointed out by Judge Hamley in **United States v. Washington,** 294 F. 2d 830 at page 832. With respect to its own **Ghione** decision, the court attempts to distinguish that case on the ground that it involved river waters, not tidal waters; but the Constitution of the State of Washington makes no such distinction. Finally, with respect to **United States v. Washington,** 294 F. 2d 830, the Washington court inferentially agrees that it is arriving at a different result than that case, but states that although the Court of Appeals has a right to establish any rules of property it wishes with respect to the Federal government's rights in its own property, that the controversy of the State with Mrs. Hughes presents a question to be determined by state and not federal law, even though

Mrs. Hughes derived her title from the United States Government. In short, the State court ignores its own prior determination that a matter of this kind is a Federal question, as it determined itself in **Washougal & LaCamas Transp. Co. v. Dalles P. & A. Nav. Co.**, 27 Wash. 490, 68 Pac. 74 (1902).

On analysis, the authority for the Hughes opinion can be reduced to the weight given a scientifically unsupported administrative interpretaton of the Commissioner of Public Lands as expressed in seventy-three Superior Court decisions, all but two being non-adversary, none appealed, and none reported.

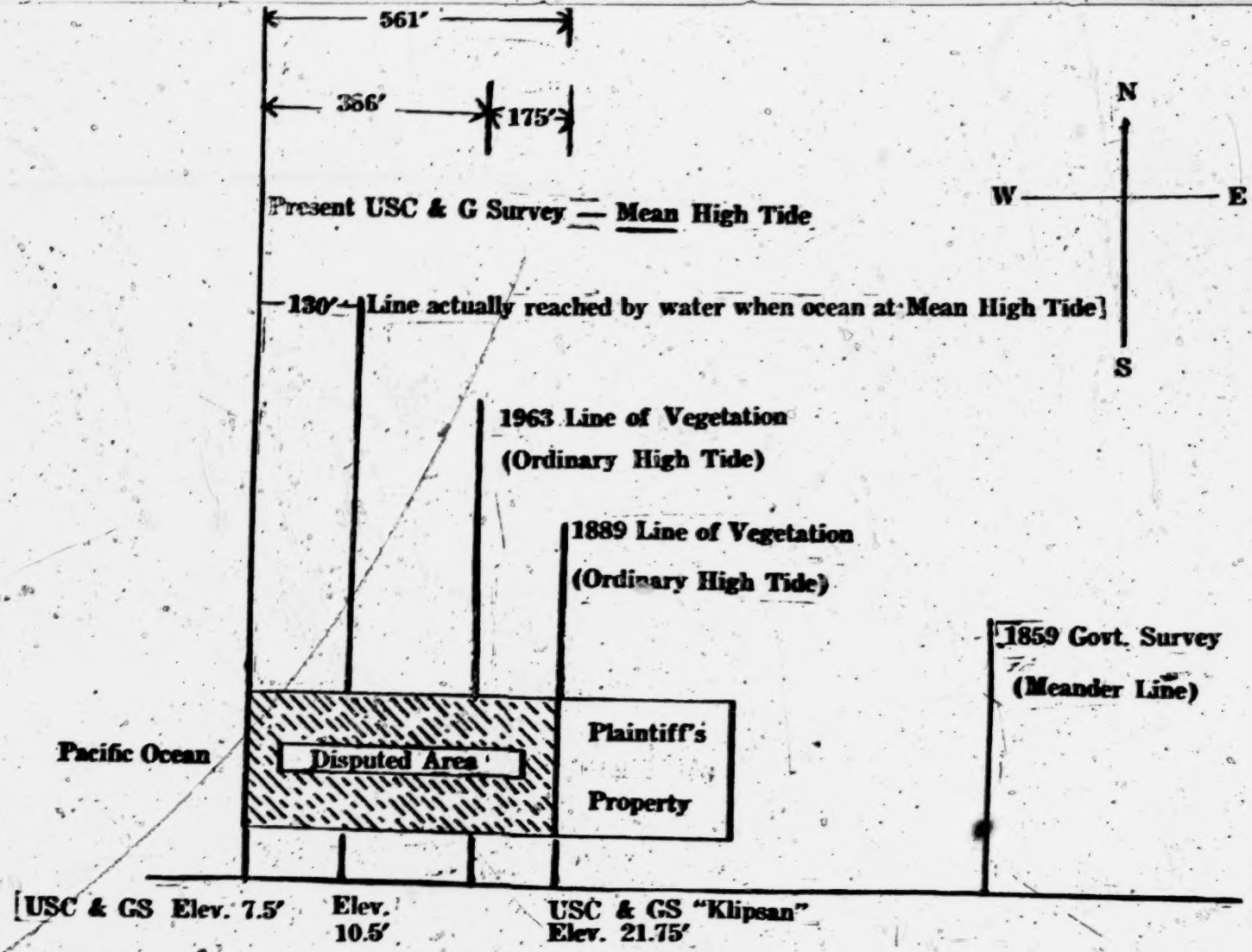
Untenable, too, is the position of the majority opinion in regard to erosion. As is stated by Judge Hill in his dissent at page 821 (R. 47):

> "Under the majority rule, the upland owner would continue to have title to the 1889 line, and the public seemingly would have to swim to enjoy its 'highway' and beach rights. Only under the shifting boundary rule will the rights of the public always be preserved * * * 'in waters where the tide ebbs and flows'."

Here, then, is a decision which creates a new concept of real estate law without the authority of past precedent, either State or Federal, that should have been decided under Federal law, but which is irreconcilable with the applicable Federal rule and the applicable common law, and probably irreconcilable with its own prior decisions which it does not overrule. Such an opinion should be stricken down and reversed.

III. THE DECISION UNDER REVIEW, IF NOT REVERSED, WOULD CREATE A RULE OF PROPERTY THAT WOULD LEAVE THE OWNERSHIP AND BOUNDARIES OF THE COASTAL LANDS OF WASHINGTON STATE IN A CONDITION OF HOPELESS UNCERTAINTY; IT WOULD PLACE UNWARRANTED RESTRICTION ON THE RIGHT OF THE UNITED STATES TO CONVEY PROPERTY RIGHTS AND ITS CITIZENS TO RECEIVE THOSE RIGHTS; AND IT WOULD UNCONSTITUTIONALLY DEPRIVE THE PETITIONER AND THOSE SIMILARLY SITUATED OF THEIR PROPERTY RIGHTS.

Mrs. Hughes does not rest her claim for relief upon the sole ground of a conflict between State and Federal law, and upon her claim that, as between the two, the Federal law necessarily governs. The merits of her position extend further than that issue. Mrs. Hughes and those similarly situated in hundreds of ownerships are presently immersed in a morass of uncertainty over their land ownerships and the nature and extent thereof. If the decision of the Washington State Supreme Court is to stand, Mrs. Hughes now owns substantially less rights than those purchased by her original predecessor in interest from and conveyed by


561'
366'
175'
N
W
E
S
Present USC & G Survey — Mean High Tide
130'
Line actually reached by water when ocean at Mean High Tide
1963 Line of Vegetation
(Ordinary High Tide)
1889 Line of Vegetation
(Ordinary High Tide)
1859 Govt. Survey
(Meander Line)
Pacific Ocean
Disputed Area
Plaintiff's
Property
USC & GS Elev. 7.5'
Elev.
10.5'
USC & GS "Klipsan"
Elev. 21.75'

the United States Government one hundred years earlier. No attorney or engineer can now advise her or her neighbors where or how this boundary line can now be located.

The definition of "ordinary high tide" as framed by the majority decision is based on no known data reducible to an engineering formula. An attempt is made to correlate the line to a vegetation line as of seventy-five years ago, but this data does not exist either in time or place. A vegetation line can only be established by visual observation at a particular time and place, and will change according to nature's laws which have not yet been reduced to a specific engineering or judicial rule. The variations of nature in respect to vegetation and the soil upon which it grows are reflected only by a botanical study as distinct from the action of the tides, and any reference to such a line without the background is, as the sketch appearing in the **Hughes** decision on page 803, (R. 26-27), **pictorial rather than precise.**

Mrs. Hughes is not alone in her predicament; all tidal boundaries of the State of Washington are involved. She does not here stress the vast amounts of money that have been invested by individuals and municipalities for waterfront property, nor the economic and social value thereof, but she does represent the position of the average citizen who buys waterfront prop-

erty because he has been taught during his lifetime to expect that his water boundary would be the water, and not be closed in by a new and intervening strip subject to sale or lease at the whim of the Legislature or of some State department.

To permit the majority opinion of the Supreme Court of the State of Washington in the case on review to stand would place an unwarranted and illegal restriction upon the right of the Government to convey property rights to a citizen and upon the right of a citizen to receive the benefit of those rights. Those situated as Mrs. Hughes, who purchased waterfront property and deraign title from the United States Government, acquired with their property the right under Federal law to any accretions as an upland owner so that the boundary of that property would remain the waterfront for which the owner bargained and paid. The State of Washington or any other state or department thereof, either by judicial pronouncement or otherwise, may not take those rights away from the owner and set up an intervening ownership in its place without compensation. The action of the State constitutes an unwarranted and unconstitutional interference with the rights of the United States and an unwarranted and unconstitutional interference with the rights of citizens such as Mrs. Hughes.

CONCLUSION

For all of the reasons set forth above, Mrs. Hughes respectfully submits that the judgment of the court below should be reversed.

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OPINIONS BELOW

The opinion of the Superior Court of the State of Washington for Pacific County (R. 16-21) is unreported. The opinion of the Supreme Court of the State of Washington (R. 22-42), and dissenting opinion (R. 42-48), are reported at 67 Wn.2d 799, 410 P.2d 20.

JURISDICTION

The opinion of the Washington Supreme Court was filed on January 20, 1966. It became the final

judgment of the court on April 14, 1966, upon denial of a petition for rehearing (R. 63-64) and issuance of the remittitur (R. 64-65) to the trial court. The petition for writ of certiorari was filed on July 12, 1966, and was granted on January 9, 1967 (R. 65), 385 U.S. 1000. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

As interpreted by the Washington Supreme Court, article 17, section 1, of the Washington Constitution establishes the line of vegetation,[1] as it existed on the date of statehood, as a fixed boundary marking state tideland ownership. The questions presented here are:

1. Whether the state may prospectively abolish an upland owner's common law riparian right to acquire tideland by accretion where title to the upland property is deraigned from a United States patent issued prior to statehood?

2. Whether the state may designate the *line of*

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[1] As used here and throughout the remainder of this brief, "line of vegetation" means an observable line impressed upon the soil by action of the water which covers it for sufficient period to deprive the soil of vegetation and destroys its value for agricultural purposes. It is the equivalent to the line utilized by the United States to mark the limits of its navigational servitude over non-tidal waters, *e.g., Borough of Ford City v. United States,* 345 F.2d 645 (3d Cir. 1965), and by the State of Washington to mark the limits of its ownership under navigable lakes, *Austin v. Bellingham,* 69 Wash. 677, 680-81, 126 Pac. 59, 61 (1912), and streams, *Washougal Transp. Co. v. Dalles Nav. Co.,* 27 Wash. 490, 497, 68 Pac. 74, 77 (1902).

vegetation as the boundary of tidelands (rather than the *line of mean high tide*[2]) where title to adjoining upland is deraigned from a United States patent issued prior to statehood?

STATEMENT

I

Stella Hughes owns upland proprety on the Long Beach Peninsula near Ocean Park, Washington (R. 23). Her property is a part of Government Lot 3 in Section 4, Township 11 North, Range 11 West, W.M., which at the time of the original government survey in 1859 was bounded on the west by the Pacific Ocean (R. 23). Private title to Lot 3 antedates Washington statehood and was initiated by a patent from the United States (R. 23).[3]

Since the original government survey in 1859, accretions to the beach and shore of the Pacific Ocean have added extensive areas of fast land to the westerly side of the Long Beach Peninsula (R. 8).

---

[2]As used here and throughout the remainder of this brief, "line of mean high tide" means a line where the shore is intersected by the tidal datum plane elevation of "mean high tide" as defined by the U. S. Coast and Geodetic Survey in *Special Publication No. 135, Tidal Datum Planes* 86 (rev. ed. 1951). It is the line approved by this Court in *Borax, Ltd. v. Los Angeles,* 296 U.S. 10 (1935), to mark the limit of tidelands adjacent to Morman Island in Los Angeles harbor.

[3]The patent is not included in the record of this case. However, it is a matter of public record, see *Brief for the United States as Amicus Curiae* 2, and is set out in full as Appendix A to the state's *Reply to Memorandum for the United States as Amicus Curiae* 12-13. Since issuance of the patent on July 2, 1866, the United States, of course, has had no interest in the lands.

The record shows that in front of Mrs. Hughes' property the distance from the government meander line of Lot 3 to the 1963 line of vegetation[4] was over 525 feet; the distance from the meander line to the 1963 line of mean high tide[5] was over 910 feet (R. 26; R. 15, Def. Ex. 5, Map No. 1). Such growth of accreted lands along the Washington coast is not uncommon. Most of the shore and beach of Grays Harbor and Pacific Counties has grown in this fashion. (R. 15, Def. Ex. 5, Maps Nos. 2-4.)

In the past the State of Washington has claimed ownership of that portion of the accreted land formed from state-owned tidelands and its claim has developed into a local rule of property (R. 36).[6] Over the years 73 lawsuits affecting 322 private ownerships have been instituted against the state to divide private from public land. In every one of these cases the superior court divided the accretions on the same formula: those accretions formed prior to statehood belong to the private upland owner; those accretions formed after statehood to the public beach and shore. (R. 36; R. 15, Def. Ex. 5, pp. 2-3, Map Nos. 2, 4.)[7] Furthermore, in Grays Harbor County, where statute[8] so directed, the state delivered over a hundred

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[4]See note 1, *supra*, p. 2.

[5]See note 2, *supra*, p. 3.

[6]See, also, *United States v. Washington*, 294 F.2d 830, 831-32 (9th Cir. 1961).

[7]For the purpose of division of the 1889 (statehood) line of vegetation, not the 1889 line of mean high tide, served to mark the boundary between the private and public property (R. 26, 36; R. 15, Def. Ex. 1, p. 2).

[8]Wash. Laws of 1929, ch. 78 (uncodified).

deeds conveying accreted lands along the coast to private grantees (R. 15, Def. Ex. 5, pp. 2-3, Maps Nos. 3, 4).[9] Consequently, the greater portion of the accreted land between the Copalis River and Grays Harbor has been sold (R. 15, Def. Ex. 5, Map No. 4); approximately sixty sales have been made in the Grayland area south of Grays Harbor (R. 15, Def. Ex. 5, Map No. 5).

II

Public ownership of the beach, shore, and accreted land along the coast of Washington, west of the 1889 line of vegetation, has long been reserved for public recreational use. In 1901 the Washington legislature dedicated the "shore and beach" from the Columbia River north to the Queets River as a "public highway forever."[10] Wash. Laws of 1901, chs. 105, 110; Wash. Rev. Code §§ 79.16.160-79.16-.171. This dedication, of course, included the shore and beach along the westerly side of the Long Beach Peninsula where the property of Mrs. Hughes is

[9]See, also, *United States v. Gas & Oil Development Co.*, 126 F. Supp. 840, 845 (W.D. Wash. 1954).

[10]As interpreted by the Washington Supreme Court, these acts of the legislature did not create a road intended for automobile traffic; they created a recreational area (R. 32). As Judge Fullerton explained in *Williams Fishing Co. v. Savidge*, 152 Wash. 165, 181, 277 Pac. 459, 464 (1929):

> Prior to the year 1901, when the legislature declared the tide lands to be a public highway, the beach had become a favored resort for the people of the state who were seeking rest and recreation, and, as I gather from the surroundings and the current history of the times, the purpose of the legislature was, not so much to establish a thoroughfare, as it was to preserve the beach as a recreational ground for the use of the public.

located. The remainder of the beach, from the Queets River north to Cape Flattery, was similarly dedicated to public use in 1935. Wash Laws of 1935, ch. 54; Wash. Rev. Code §§ 79.16.130-79.16.150.

The inner or inland boundary of the "public highway" could be construed, under a literal reading of the dedicatory acts, as a moving boundary so as to free the beach and shore of the statutory dedication as fast land was added by accretion (R. 32-33). However, prior to the Washington court's opinion in the present case, the dedicatory acts were not generally read in this fashion.[11] In 1928 the Washington Attorney General ruled that fast land built by accretion remained subject to the dedication. He said:

> With the gradual accretion of the ocean sands the strip uncovered by the ebb and flow of the tide gradually receded to its present position creating from time to time new area constituting a public highway by reason of the language "as such shore and beach * * * *hereafter may be*", but this gradual recession did not, in our opinion, have the effect of divesting the former area of its character as part of the public highway. 1927-28 Opns. Att'y Gen. 779, 780 (Wash. 1928)

A year later, in 1929, the Washington legislature apparently accepted the Attorney General's views about a fixed inner boundary to the public highway and proposed a change to a moving boundary, at least in Grays Harbor County. By Wash.

[11]The court below left the question open (R. 32), 67 Wn.2d at 807, 410 P.2d at 25; the dissenting judges would give the dedicatory language a literal reading (R. 46-47), 67 Wn.2d at 819-20, 410 P.2d at 31-32.

Laws of 1929, ch. 78 § 1, the legislature authorized the sale of,

> All lands owned by the state bordering on the Pacific Ocean * * * [within Grays Harbor County] lying above on the land side of the inner boundary of the highway reservations made by chapter CV and chapter CX, Laws of 1901, same being a line of ordinary high tide as the same is now located or as it may hereafter exist.

All inference that the statute was intended to operate outside of Grays Harbor County and in Pacific County as well (where Long Beach Peninsula and Mrs. Hughes' property is located) was soon dissipated as an indirect result of the *Williams Fishing Co.* opinions of the Washington Supreme Court.[12]

The issue in *Williams Fishing Co.* was whether Peacock Spit (located at the mouth of the Columbia River in Pacific County) was subject to the public highway dedication. When the case was heard *en banc*, after a departmental hearing and opinion, four of the nine members of the court chose to comment about the inner boundary of the highway. The views of three of the judges were most explicit. Judge Fullerton (with Judges Parker and French concurring) said, 155 Wash. at 453-54, 284 Pac. at 748:

> As I understand it, the grant [of the highway to the public] was a grant of a specific tract of property, as much so as it would have been had it been described by metes and bounds. In effect,

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[12] *Williams Fishing Co. v. Savidge*, 152 Wash. 165, 277 Pac. 459 (1929) (departmental opinion); *on rehearing*, 155 Wash. 443, 284 Pac. 744 (1930) (en banc); *after trial*, 164 Wash. 50, 2 P.2d 722 (1931).

> the grant was of the tide lands to which the state had title; such tide lands as it acquired by the reservation made in the constitution at the time the territory of Washington was admitted into the Union as a state. The lands acquired by that reservation are in no sense ambulatory. They are fixed and determined. Under the somewhat peculiar wording of the dedicatory grant, the highway may widen by accretions thereto, but the inner shore lines and the end lines remain the same. If any part of the tide lands have become uplands by accretion since the reservation was made, the highway extends over such uplands, * * *

Nonetheless, only Judge Holcomb of the remaining members of the court saw fit to reject the fixed inner boundary in favor of an ambulatory line, and even he remained silent about state ownership of accreted land above such an ambulatory line. *Id.* at 448-50, 284 Pac. at 746.

III

Two recent enactments of the Washington legislature manifest a clear intent to preserve the Washington shore and beach for public recreation. The first of these enactments became law before this present case was decided, Wash. Laws of 1963, ch. 212; RCW 79.16.172. The statute specifically declares:

> That *portion* of the public highway as established by chapter 54, Laws of 1935, chapter 105, Laws of 1901, and chapter 110, Laws of 1901, lying between the line of vegetation and the line of mean high tide, as such lines now are or may hereafter be, is hereby declared a public recreation area and is hereby set aside and forever

reserved for the use of the public. [Emphasis ours.] Wash. Rev. Code § 79.16.172.

The statute does not purport to redefine either the inner or outer boundaries of the earlier public highway dedication. Instead, it expresses a legislative judgment[13] that the prior legislative acts did include that portion of the beach and shore between the line of mean high tide and the line of vegetation. (In front of Mrs. Hughes' property this strip of beach is 386 feet wide (R. 26).)

The second of the two enactments was adopted by the Washington legislature after the decision in the present case, Wash. Laws of 1967, ch. 120 (set out as Appendix A, *infra*, pp. 35-42).

The 1967 legislation affects the entire length of Washington's Pacific Ocean beaches by establishing the Washington State Seashore Conservation area "for the recreational use and enjoyment of the public", § 2, *infra*, p. 36. All lands now or hereafter under state ownership "between the present line of ordinary high tide and the line of extreme low tide, as this line now is or may hereafter be located" are included within the Seashore Conservation Area, *ibid.*, and these lands are to be devoted to all forms of outdoor recreation, subject to the general jurisdiction of the Washington State Parks and Recreation Commission, §§ 1, 4, 5, *infra*, pp. 35-36, 36-37.

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[13] The Washington House of Representatives passed the measure without a dissenting vote. *Journal of the House, 38th Legislature* 1185 (1963). The measure passed with but one dissenting vote in the Washington Senate. *Journal of the Senate, 38th Legislature* 905 (1963).

Accreted lands between the Seashore Conservation Area and private ownership are placed under the jurisdiction of the Department of Natural Resources, but subject to a prohibition against sale, lease, or other disposal, with only minor exceptions,[14] § 8, *infra*, pp. 39-40. The purpose of the restrictions is to permit the Parks and Recreation Commission to select portions of the accreted lands for use in connection with the Seashore Conservation Area.

Under section 11 of the act, *infra*, pp. 40-41, the boundary between state-owned accreted land and adjacent property is to be monumented by the Department of Natural Resources. Objections to the location of monuments are to be heard by the State Harbor Line Commission, § 12, *infra*, p. 41.[15]

IV

Mrs. Hughes initiated this litigation as a suit to quiet her upland title seaward to the line of mean high tide as it may exist any given time (R. 2-3, 23). Her claim of title thus encompassed all accreted land formed in front of her property (both before and

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[14]The statute permits exploration for oil and gas, but prohibits drilling rigs and equipment on the Seashore Conservation Area or on the accreted lands, and with the approval of the Parks and Recreation Commission, it permits limited sales of sands to local cranberry growers and mining of "black sands," a mineral, between the north jetty of the Columbia River and the North Head Lighthouse. No other private use of the accreted lands is permitted.

[15]The filing of objections with the Harbor Line Commission is not made mandatory by § 11(2), and it would appear that the private owner may therefore bypass administrative remedies and instead challenge the location of monuments by direct action in superior court.

after statehood) and the upper 386 feet of the beach lying between the line of mean high tide and the line of vegetation (R. 26).

The state disclaimed title to accreted land formed prior to statehood, but asserted title (subject to the 1901 highway dedication) to accreted land formed after statehood. Additionally, the state contended that the boundary between its ownership and Mrs. Hughes' ownership was the line of vegetation as of the date of statehood (November 11, 1889). (R. 3-5, 23-24.)

After trial the superior court sustained Mrs. Hughes' claim of title (R. 7-10) and the state appealed. On appeal the Washington Supreme Court reversed, holding that article 17, section 1, of the Washington Constitution operated on the date of statehood to extinguish all riparian rights of uplands adjacent to state-owned tidelands, including the right to acquire that tideland in the future by accretion, thus fixing the state's tideland boundaries as of that date (R. 37-40). In so ruling the court rejected the line of mean high tide of the U.S. Coast and Geodetic Survey as the upper limit of the tidelands claimed by the state under article 17, section 1 (R. 35), and instead approved the past marking of the upper limits by the State Commissioner of Public Lands (R. 36-37) on the basis of the line of vegetation (R. 15; Def. Ex. 1, p. 2).[16]

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[16]The state's understanding of the court's opinion on this issue is shared by Mrs. Hughes and Professor Corker, who has written an exhaustive comment about this case.

SUMMARY OF ARGUMENT

Question No. 1. A state may prospectively abolish an upland owner's common law riparian right to acquire tideland by accretion even though title to the upland property is derived from a pre-statehood patent issued by the United States (*infra*, pp. 14-22).

The state may make the change because no riparian owner has a vested right to future accretion, *Western Pac. Ry. v. Southern Pac. Co.*, 151 Fed. 376 (9th Cir. 1907) (*infra*, pp. 15-17), even though his title is derived from the United States, because it has long been settled federal law that Washington could abolish all riparian rights on navigable waters, *Port of Seattle v. Oregon & Wash. R.R.*, 255 U.S. 56 (1921), and because riparian rights under a United States patent are left entirely to the state, *St. Anthony Falls Power Co. v. Water Comm'rs*, 168 U.S. 349 (1897) (*infra*, pp. 17-21).

Borax, Ltd. v. Los Angeles, 296 U.S. 10 (1935), is not authority for a federally created right to future accretion because (1) the case is not an accretion case nor concerned with riparian rights generally, and in any event (2) the right to future accretion (in the absence of all other riparian rights) does not qualify as an "essential" basis of right within the federal rule for rejecting state law (*infra*, pp. 21-22).

Question No. 2. Washington may designate the

See *Brief for the Petitioner* 4, 10, 15-18, and Corker, *Where Does the Beach Begin, and to What Extent is this a Federal Question*, 42 Wash. L. Rev. 33, 43-45 (1966).

line of vegetation as the boundary of its tidelands (even though title to adjoining upland is derived from a pre-statehood United states patent) because such a line is a reasonable interpretation of the common law and one which does not impair the efficacy of the federal grant or the use and enjoyment of the upland property (*infra*, pp. 22-34).

Washington's choice of the vegetation line as its tideland boundary was made in the early days of statehood and in accordance with the applicable federal rule of that time as announced by this Court in *San Francisco v. LeRoy*, 138 U.S. 656 (1891) (*infra*, pp. 23-25). The line of mean high tide rule, as applied to the facts of this case, would vest an upland owner with a strip of ocean beach 368 feet wide, thereby partitioning upland from tideland in a manner that totally ignores the characteristics of tidelands which constitute the very reason for assignment of their ownership to the state as soverign (*infra*, pp. 25-28).

Borax, Ltd. v. Los Angeles, 296 U.S. 10 (1935), properly understood, does not preclude designation of the line of vegetation by state law as the water boundary of federally patented uplands. Therefore the usual rules governing the construction of federal patents should be applied, *i.e.*, federal law should be deemed to incorporate state law. *Packer v. Bird*, 137 U.S. 661 (1891); *Oklahoma v. Texas*, 258 U.S. 574 (1922). If *Borax* is now construed to be applicable to this case, we ask the Court to overrule the prior holding (*infra*, pp. 28-34).

ARGUMENT

A.—*A state may prospectively abolish an upland owner's common law riparian right to acquire tideland by accretion even though title to the upland property is derived from a pre-statehood patent issued by the United States.*

Under common law, when tidelands are slowly and imperceptibly built up by a deposit of ocean sands, the sovereign is divested of title as fast land is formed and title is acquired by the adjoining riparian owner. As interpreted by the Washington Supreme Court in this case, the Washington Constitution, art. 17 § 1, extinguished the common law right to *future* accretion, just as the constitution was interpreted in the past to have extinguished all other common law riparian rights. See, *e.g.*, *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539 (1891). A fixed instead of a moving boundary results from the state modification of the common law because it has long been the rule in Washington that the state may not acquire title to uplands by erosion. *Washougal Transp. Co. v. Dalles Nav. Co.*, 27 Wash. 490, 68 Pac. 74 (1902).[17]

There is an important exception to the Washington fixed boundary rule. The Washington Su-

[17]The state has never contended and no court below has held, that the state constitution operates to divest an owner of accreted land, title of which vested before statehood under the law applicable at the time the accretion was formed. The state fixed boundary rule merely operates to extinguish the upland owner's common law right to acquire future title to lands not yet formed.

preme Court has acknowledged that the state constitutional change in the common law does not apply to the public domain of the United States (R. 41), 67 Wn.2d at 815, 410 P.2d at 29. It becomes effective only after the United States parts with title. In such case the seaward boundary of the lands would become fixed as of the date of the government's patent, not as of the date of statehood.

The basis for the distinction between private property and the public domain arises from the property clause of the federal constitution which gives Congress the power to make "all needful Rules and Regulations" respecting property belonging to the United States. U. S. Const. art. 4, § 3, cl. 2. The moving boundary rule of the common law, being applicable law prior to statehood, remains applicable law after statehood because Congress has not acted to change it.

I

It cannot be doubted that the common law moving boundary rule can be modified; " * * * no riparian owner has a vested right in the general law of accretion, except as to alluvion that was added to the shore while the law was in effect," *Humble Oil & Refining Co. v. Sun Oil Co.*, 190 F.2d 191, 194 (5th Cir. 1951).

Despite a general preference throughout the nation for a moving boundary, at least two other states beside Washington have chosen a fixed boundary rule. Louisiana, for example, chose to retain title

to accretions formed on the sea or an arm of the sea, leaving only proprietors on rivers and streams to acquire title by accretion. *Zeller v. Yacht Club*, 34 La. Ann. 837 (1882). The Louisiana statute thus accords with prior Spanish civil law codes. See *Ker v. Couden*, 223 U.S. 268, 279 (1911).

Oregon, which like Washington is a public land state, has modified the common law moving boundary rule by statute. Chapter 278, Oregon Laws of 1917, Ore. Rev. Stat. § 274.420 (1965), reserves to the state all land formed from the bed of navigable lakes by accretion or reliction after the effective date in 1917 of the law.

The best statement in support of a state's right to change the common law moving boundary rule is found in an opinion of the federal court in *Western Pac. Ry. v. Southern Pac. Co.*, 151 Fed. 376 (9th Cir. 1907). The court there said, 151 Fed. at 400:

> [T]he decision in *Shively v. Bowlby*, 152 U.S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331, sustains the power of a state to cut off, without compensation, the right of a riparian proprietor to future accretion. We know of no decision in which this doctrine has been questioned. If it is within the power of the state to thus appropriate and improve tide-land or submerged land in front of a riparian proprietor, and thus deprive him of the right of future accretion, what tenable ground is there for saying that the state may not by statute accomplish the same result, and for holding that the state of California by its statute of 1872 could not lawfully make provision, as it did, that the limits of lands owned by riparian proprietors of bays and arms of the

> sea could not be extended over the lands then held in trust for the public by virtue of any accretion that might thereafter be deposited thereon?[18]

We note parenthetically that this Court on one occasion referred to the right of "future alluvion" as "vested," *County of St. Clair v. Lovingston*, 23 Wall. 46, 68 (1874). However, the circuit court did not overlook the case; it concluded that the statement was not to be read literally because, 151 Fed. at 398-99:

> The controversy in that case did not even remotely relate to the right of future alluvion, but related only to alluvion then existing. We cannot think that the court meant to announce the doctrine that the right to alluvion becomes a vested right before such alluvion actually exists.

The circuit court's conclusion seems entirely justified. The remark in *County of St. Clair* was intended to meet the argument that specific federal patents were to be construed as conveying property of fixed limits as under the *agri limitati* of civil law.

II

The fact that a riparian owner can trace his title to a pre-statehood United States patent does not preclude state change of the common law moving boundary rule. State changes in the common law

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[18] In *Strand Improvement Co. v. City of Long Beach*, 173 Cal. 765, 161 Pac. 975 (1916), the California Supreme Court rejected the federal court's reading of the state statute. Nonetheless the decision still stands as an expression of the court's judgment that state substitution of a fixed for a moving boundary is constitutional.

generally are usual despite past federal title to all lands that are affected by the change.

Two illustrations from Washington immediately come to mind to demonstrate general changes in common law. Prior to Initiative Measure 208 in 1961 (now Wash. Rev. Code ch. 64.28), Washington did not recognize joint tenancies in real property. Even now the incidents of joint tenancy are not necessarily the same as the common law incidents. See, Griffith, *Joint Tenancy and Community Property*, 37 Wash. L. Rev. 30 (19[illegible]). Similarly, Washington has never recognized the common law incidents of real property ownership by husband and wife. The state, instead, adopted the community property concept from the Spanish law. Wash. Rev. Code ch. 26.16.

It cannot be seriously argued that these laws, being changes in the common law, are not operative simply because all real estate in Washington was once owned by the federal government. They, like any number of other changes in the common law of real property, are nothing more than an exercise by the state of its inherent power to enact law.

Additional illustrations of Washington changes from the common law (*e.g.*, statutes of limitation, conveyancing and recording laws, laws of succession, etc.) could easily be compiled. However, since we are here concerned with Washington's abolition of the riparian right to future accretion, we turn specifically to Washington law relating to riparian rights generally.

Washington law in this field is probably unique. From the earliest days of statehood, *e.g.*, *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539 (1891), to the present time, *e.g.*, *Grill v. Meydenbauer Bay Yacht Club*, 61 Wn.2d 432, 435 378 P.2d 423, 425 (1963), Washington has expressly denied the existence of *all* riparian rights to the proprietor whose land borders navigable waters.[19]

Thus, under the doctrine of the past Washington cases, the riparian rights of wharfage, ferriage, access, and future accretions (rights ordinarily accorded by the common law to the owner abutting navigable water) do not exist in Washington.

In *Brace & Hergert Mill Co. v. State*, 49 Wash. 326, 95 Pac. 278 (1908), one of the early cases in the development of Washington law on riparian rights, it was held that there is no infirmity in the Washington doctrine as applied to riparian land held under a United States patent. *Id.* at 332, 95 Pac. at 280. Likewise, in *Port of Seattle v. Oregon & Wash. R.R.*, 255 U.S. 56 (1921), when Mr. Justice Brandeis (after an exhaustive summary of the Washington law)[20] concluded, *id.* at 67:

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[19]Cases so holding in the intervening years are numerous. See, *e.g.*, the cases cited in *State v. Sturtevant*, 76 Wash. 158, 163, 135 Pac. 1035, 1037 (1913), and *Brace & Hergert Mill Co. v. State*, 49 Wash. 326, 331, 95 Pac. 278, 280 (1908).

[20]A part of that summary reads as follows, 255 U.S. at 64:

> Under the law of Washington (which differs in this respect from the law generally prevailing elsewhere) a conveyance by the State of uplands abutting upon a natural navigable waterway grants no right of any kind either in land below highwater mark, *Eisenbach v. Hatfield*, 2 Washington, 236; or in, to, or over the water, *Van Siclen v. Muir*, 46 Washington, 38, 41; except the

> It appears, therefore, that the law of Washington does not recognize as appurtenant to upland, tide land or shore land in its natural condition, rights of any sort beyond the boundaries of the property.

it must be assumed that this Court, too, approved the denial of riparian rights to patentees of the United States. The opinion cited *Weber v. Board of Harbor Comm'rs*, 18 Wall. 57 (1873); *Shively v. Bowlby*, 152 U.S. 1 (1894); and *St. Anthony Falls Power Co. v. Water Comm'rs*, 168 U.S. 349 (1897). Each case concerned the public policy of the United States to leave to the states (or future states) the right to determine the rights and incidents of riparian ownership. That these rights and incidents are a matter of state law despite the source of riparian title is made clear in *St. Anthony Falls Power Co.* where the Court said, 168 U.S. at 363:

> It does not impair the efficacy of the grant or the use and enjoyment of the property by the grantee to hold that riparian rights are to be

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limited preferential right conferred by statute upon the owner of the upland, to purchase the shoreland, if the State concludes to sell the same. Act of March 26, 1890, §§ 11 and 12, Laws of Washington 1889-1890, p. 505. The grantee of the upland cannot complain of another who erects a structure below highwater mark, *Muir v. Johnson*, 49 Washington, 66. He does not acquire any right of access over the intervening land and water area to the navigable channel, *Lownsdale v. Grays Harbor Boom Co.*, 54 Washington, 542, 550, 551. So complete is the absence of riparian or littoral rights that the State may—subject to the superior rights of the United States—wholly divert a navigable stream, sell the river bed and yet have impaired in so doing no right of the upland owners whose land is thereby separated from all contact with the water. *Newell v. Loeb*, 77 Washington, 182, 193-194; *Hill v. Newell*, 86 Washington, 227, 228.

decided by the state courts, inasmuch as the grant, if by the Federal Government, has been held in the cases already cited, not to include title over navigable waters within or bounded by the States.

III

The case of *Borax, Ltd. v. Los Angeles*, 296 U.S. 10 (1935), is not authority for federal court nullification of Washington's fixed boundary rule. *Borax* was not an accretion case. It involved no accreted lands. It decided no matter of riparian rights. And in any event, the right to future accretion does not qualify as an "*essential* basis of right" (emphasis ours) upon which the riparian right to future accretions may be distinguished from other riparian rights.

We can emphasize our point by reference to the common law incidents of riparian ownership that are admittedly left to state determination. *First*, a state can deny or permit, or permit on terms of its own choosing, access to navigable water. *Port of Seattle v. Oregon & Wash. R.R.*, 255 U.S. 56, 64 (1921), citing with approval *Lownsdale v. Grays Harbor Boom Co.*, 54 Wash. 542, 103 Pac. 833 (1909). *Second*, a state can determine the use riparians may make of the water that flows by their property. *St. Anthony Falls Power Co. v. Water Comm'rs*, 168 U.S. 349 (1897). *Third*, the state may abolish the riparian right to wharf out. *Shively v. Bowlby*, 152 U.S. 1 (1894). *Fourth*, the state may fill tidelands and thereby forestall future accretion.

United States v. Mission Rock Co., 189 U.S. 391 (1903).

If a state has complete freedom to do as it chooses with regard to the rights that make waterfront ownership valuable—rights of access, use of the water, wharfage, etc.—what reason is there for doubting its power to modify the common law accretion rule? Clearly the important consideration underlying the accretion rule is to protect the basic rights of access and use of navigable waters. See, *e.g.*, *Lamprey v. State*, 52 Minn. 181, 53 N.W. 1139, 1142 (1893). It must follow therefore that the right to future accretion hardly qualifies as an "essential" basis of right under a federal patent.

B.—*Washington may designate the line of vegetation as the boundary of its tidelands (even though title to adjoining upland is derived from a pre-statehood United States patent) because such a line is a reasonable interpretation of the common law and one which does not impair the efficacy of the federal grant or the use and enjoyment of the upland property.*

The second question before the Court concerns title to the 386 feet of beach in front of Mrs. Hughes' property, lying between the present "line of mean high tide" and the present "line of vegetation." The state asserts title to this 386-foot strip irrespective of the decision reached on the accretion issue. It does so on the ground that these lands are now tidelands, even under a moving boundary rule.

I

There can be no doubt about the State of Washington's claim of title to lands underlying the navigable waters within the state. Its constitution speaks plainly:

> The state of Washington asserts its ownership to the beds and shore of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: *Provided*, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the the courts of the state. Wash. Const. art. 17 § 1.

By this provision the people of the state claimed rights in *all* navigable waters, whether lakes, rivers, fresh, or salt, to the same extent as the English Crown claimed in the sea. The people thereby rejected any distinction between tidal and non-tidal waters. *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 64 Pac. 735 (1901). The claim, of course, was based upon the inherent sovereignty of the new state, *Robinson v. Silver Lake Ry. & Lum. Co.*, 153 Wash. 261, 274-75, 279 Pac. 1109, 1113 (1929), and in no sense can be deemed ownership by virtue of a grant from the federal government, *cf. Pollard v. Hagan*, 3 How. 212 (1845).

The state was able to make its claim without violating vested rights of others because prior to statehood the United States had held title to the lands underlying navigable waters in trust for the future state. *Shively v. Bowlby*, 152 U.S. 1 (1894).

There likewise has never been any practical question in Washington about the *limits* of the tidelands claimed by the state. State officers exercising jurisdiction over tidelands have always used the line of vegetation to locate the boundary of tidelands (R. 15, Def. Ex. 1, p. 2). The justification for past use of such line is obvious. The statutes governing the platting and disposal of the vast tideland ownership of the state antedate by many years *Borax, Ltd. v. Los Angeles*, 296 U.S. 10 (1935).[21] No "line of mean high tide" rule had yet been formulated.

For whatever reason the line of vegetation rule was originally adopted, it does have practical advantages. Use of the line of vegetation to determine tideland boundaries gives Washington a uniform rule for determining state interest under all its navigable waters, be they tidelands, as in *Shelton Logging Co. v. Gosser*, 26 Wash. 126, 66 Pac. 151 (1901), and *Harkins v. Del Pozzi*, 50 Wn.2d 237, 310 P.2d 532 (1957), the bed of a navigable lake, as in *Austin v. Bellingham*, 69 Wash. 677, 126 Pac. 59 (1912), or the bed of a navigable stream, as in *Washougal Transp. Co. v. Dalles Nav. Co.*, 27 Wash. 490, 68 Pac. 74 (1902).

Additionally, when adopted, the line of vegeta-

[21]The Washington statutes of general application to platting and sale are presently codified as a part of Wash. Rev. Code ch. 79.01. See, especially, §§ 79.01.008-79.01.032, 79.01.428-79.01.496. The last general revision of these statutes was made by the legislature in 1927, Wash. Laws of 1927, ch. 255, but at the legislative source notes and annotations indicate, the substance of the statutes had its origin in legislation enacted between 1890 and 1897.

tion rule had the merit of coinciding with the definition used by this Court to mark the limits of the tidelands a state might claim by virtue of its sovereignty. In *San Francisco v. LeRoy*, 138 U.S. 656 (1891), decided less than three years after Washington statehood, the Court pointed out, *id.* at 671-72:

> The lands which passed to the State upon her admission to the Union were not those which were affected occasionally by the tides, but only those on which tide-water flowed so continuously as to prevent their use and occupation. To render them tide-lands, which the State by virtue of her sovereignty could claim, there must have been such continuity of the flow of tide-water over them, or such regularity of the flow within every twenty-four hours, as to render them unfit for cultivation, the growth of grasses, or other uses to which up-land is applied.

Interestingly enough, the line of vegetation rule of *San Francisco v. LeRoy*, which the state and its land office follows, is also the rule followed by the federal land office. In the 1947 *Manual of Surveying Instructions* published by the U. S. Dept. of Interior, Bureau of Land Management, the Department of Interior makes no mention whatever of *Borax* and instead quotes the same line of vegetation rule from *San Francisco v. LeRoy* that we have quoted. See *Manual*, at p. 379.

II

The *Borax* line of mean high tide rule as applied to the facts of this case leads to an inappropriate measure of tidelands. Tidelands have their special status as sovereign lands of the state because of their

character, *i.e.*, the uses to which they may be put, their distinctness from adjoining uplands, and their obvious relation or adaptability for use in connection with the water. See, *e.g.*, *Shively v. Bowlby*, 152 U.S. 1, 11, 57 (1894); *Baer v. Moran Bros. Co.*, 153 U. S. 287 (1894). The line of mean high tide, if used to mark the tidelands in front of Mrs. Hughes' property, forces the state to disregard those special characteristics. The reason for this can be readily explained.

The Pacific Ocean tides along Washington's coast rise and fall twice daily. These tides result from the interaction of the gravitational forces of the sun and moon on the rotating earth. U. S. Dep't of Commerce, Coast and Geodetic Survey, *Special Publication No. 135, Tidal Datum Planes* 2 (rev. ed. 1951). The moon, because it is closer, exerts the principal attraction. *Id.* at 2. A complete tidal cycle, *i.e.*, one making allowances for all the considerations that go into a determination of tidal action, extends over a period of 18.6 years. *Id.* at 86.

The tidal datum planes of the U. S. Coast and Geodetic Survey are all based upon the 18.6 tidal cycle. Thus "mean high tide" is defined by it simply "as the average height of the high waters at [any] place over a period of 19 years." *Id.* at 86. Mean high tide is therefore calculated by averaging the heights af daily *higher* high tides and daily *lower* high tides over a period of 19 years. *Ibid.* Mean high tide is therefore the average elevation which is reached by the ocean *twice* daily. It is not the same as the aver-

age daily high tide. Averaging each day's highest tide (over a 19 year period) gives us the tidal datum plane of "mean higher high tide." *Id.* at 124.

In front of Mrs. Hughes' property, the line of mean high tide, determined in accordance with the U. S. Coast and Geodetic Survey's tidal datum plane of mean high tide, fails to include the upper 386 feet of the visible beach as marked by the line of vegetation. Four considerations explain this situation.

First, when the U. S. Coast and Geodetic Survey makes its measurements of the tides, it eliminates irregularities in the sea level caused by larger waves, ocean swells, and seiches. *Id.* at 39. In front of Mrs. Hughes' property, these phenomena add three feet of elevation to the sea level at all times (R. 15, Def. Ex. 5, p. 2, ¶ 5, and Map No. 1). As a result, when the ocean is at the level of mean high water, the waters actually reach land at an elevation three feet higher (R. 15, Def. Ex. 6) and 130 feet further inland than the *line* of mean high tide itself (R. 15, Def. Ex. 5, Map No. 1). The Washington Supreme Court showed this difference on its sketch illustrating the property in dispute (R. 26), 67 Wn.2d at 803, 410 P.2d at 22.

Secondly, the line of vegetation established on the ground is undoubtedly established by the daily *higher* high tides, whereas the line of mean high tide is the averaging of the daily *higher* tides with the daily *lower* high tides. Mean high tide is therefore a calculated elevation which is exceeded, on the aver-

age, once every day even if large waves, ocean swells, and seiches are ignored.

Thirdly, the line of mean high tide being calculated over the 19 year tidal period, by definition ignores those changes in sea level which are of a lesser duration.

Fourthly, where the beach is as flat and open as the area we are here concerned with (R. 15, Def. Ex. 6), it is only reasonable to expect incoming tides to run up the beach beyond the actual level of the ocean itself.

III

We believe the State of Washington, as a matter of federal law, is free to mark the limits of tidelands claimed by sovereign right by either the line of vegetation rule of *San Francisco v. LeRoy*, 138 U.S. 656 (1891), or by the line of mean high tide rule of *Borax, Ltd. v. Los Angeles*, 296 U.S. 10 (1955). It is free to do so because federal law incorporates[22] state law in the interpretation of a United States patent where no contrary rule is demanded by the patent itself or by federal statute or treaty, *Oklahoma v. Texas*, 258 U.S. 574, 594-95 (1922); *United States v. Oregon*, 295 U.S. 1, 27 (1935); *cf. Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966), "subject to the condition that * * * [state] rules do not impair the efficacy of the grants or the

[22] Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797 (1957).

use and enjoyment of the property by the grantee." *Packer v. Bird*, 137 U.S. 661, 669 (1891). (A Congressional purpose, also, to give a hospitable reception to state law will be found in the Federal Rules of Decision Act, 28 U.S.C. § 1652.)

There is demonstrably no federal interest which demands a uniform tideland boundary throughout the nation. See Corker, *Where Does the Beach Begin, and to What Extent is this a Federal Question*, 42 Wash. L. Rev. 33, 97-98 (1966). Indeed, in the light of the materials Professor Corker collects, it appears that a uniform federal rule can in any event only affect Alaska, Washington, and Oregon. (California is not affected because, despite *Borax*, it adheres to a neap tide rule. *People v. William Kent Estate Co.*, 51 Cal. Rep. 215 (Dist. Ct. App. 1966). Texas and the original thirteen states are not public land states, and in all probability the tidelands of the remaining states are bounded by upland grants of sovereigns other than the United States.) Furthermore, if tideland boundaries call for a uniform rule, there is no principle by which this Court can leave to state courts the problems of inland water boundaries.[23]

In the state courts and now in this Court our contention that federal law incorporates state law has been challenged on the basis of *Borax, Ltd. v. Los Angeles*, 296 U.S. 10 (1935). *Borax* does indeed

[23]For comment about these problems, see Beck, *The Wandering Missouri River: A Study in Accretion Law*, 43 N. Dak. L. Rev. 429 (1967).

make the issue of an appropriate tideland boundary difficult.

The *Borax* litigation was originally instituted in district court where the district judge held that the government meander line of Morman Island in Los Angeles harbor constituted the boundary between uplands owned by Borax and tidelands held by the city under a legislative grant. *Los Angeles v. Borax, Ltd.*, 5 F. Supp. 281 (S.D. Cal. 1933). However, meander lines are not boundary lines and the judgment was reversed on appeal to the circuit court of appeals. *Los Angeles v. Borax, Ltd.*, 74 F.2d 901 (9th Cir. 1935).

The court of appeals sought to define the boundary in dispute before returning the case to the district court for trial. After reviewing the California and English cases and the California statute under which the city claimed title, the court concluded that the line of mean high tide, as calculated by the U. S. Coast and Geodetic Survey constituted the boundary. The Court adopted this formula because it mistakenly believed, 74 F.2d at 906, "This mean high tide line is the one usually referred to by the United States government in its patents and in the various departments delimiting the boundary between the upland and the tideland." As a matter of fact, even now the Department of Interior ignores the mean high tide line and instructs its employees to use the line of vegetation rule of *San Francisco v. LeRoy*, 138 U.S. 656, 671-72 (1891). U. S. Dep't of Interior,

Bureau of Land Management, *Manual of Instructions for the Survey of Public Lands* 379 (1947).

The court's mistake about the use of the mean high tide line by the federal land office was unfortunate, inasmuch as the court had no evidence before it about the location of such a line. The technical definition of such line was brought to the court's attention for the first time by the briefs on appeal.

Borax, as upland owner, was dissatisfied with the mean high tide rule for it claimed upland ownership extending *below* the line of mean high tide to the line of the neap tides or, alternately, to the vegetation line. 296 U.S. at 15, 22; see, also, Corker, *Where Does the Beach Begin, and to What Extent is this a Federal Question*, 42 Wash. L. Rev. 33, 57-60 (1966). It petitioned this Court for a writ of certiorari and its petition was granted, 295 U.S. 729 (1935).

The City of Los Angeles, of course, sought to uphold the California statute granting it tideland "situated below the line of mean high tide of the Pacific Ocean." This Court disposed of the issues presented by holding:

1. In California, as in other states admitted to an existing Union, the state held full sovereignty and jurisdiction over tidelands to the same extent as that held by the original thirteen states. The Federal government's grant of abutting uplands did not limit the state's rights. 296 U.S. at 15-16.

2. The General Land Office of the United States

had no right to establish the boundary between uplands and tidelands as an incident of its disposal of public lands. *Id.* at 16-21. The district court therefore fell into fundamental error in holding otherwise. *Id.* at 21.

3. The circuit court of appeals properly instructed the district court to ascertain as the disputed boundary the "mean high tide line" rather than the line of the "neap tides." *Id.* at 21-22. The court reasoned that as a matter of federal law (because Borax held title to uplands under a United States patent) the boundary dispute was to be resolved in accordance with the common law and at common law the Crown held title to tidelands lying between the line of mean high tide and the line of the neap tides. *Id.* at 22-26. The court refused to consider those California cases allegedly interpreting the common law so as to restrict the state's rights to tideland lying below the line of the neap tides. *Id.* at 26.

On the facts *Borax* is distinguishable from this case. *Borax* holds that at common law the area *below* the line of mean high tide is most certainly "tideland." There was no issue before the court about the area *above* the line of mean high tide and the only reason the line of vegetation or a line physically marked on the ground was in the case was because it was assumed this line was below that line of mean tide. Necessarily, therefore, the Court was not passing upon the state's rights above the line of mean high tide. Under the facts before the Court, its ruling

conceded the state's right to claim tidelands lying below the line of vegetation.

This Court's refusal to review the California decisions and statutes obviously creates problems of interpretation.[24] Under any view one takes of the case, for or against incorporation of state law, the California decisions and statutes concerning the line of the neap tides is material. We therefore concluded in our brief before the Washington Supreme Court (Brief of App. 70, R. 84) that the Court's refusal to consider California law meant only that the Court was paying deference to the views of the court of appeals which had decided state questions adversely to the upland owner.[25] See 74 F.2d at 905. This is ordinary practice in this Court, *Hillsborough v. Cromwell*, 326 U.S. 620, 630 (1946); rulings of a lower federal court applying local law will not be set aside except on a plain showing of error, *Palmer v. Hoffman*, 318 U.S. 109, 118 (1943).

If we are mistaken about the reasons for the refusal to consider California law, we ask this Court to overrule *Borax* and hold instead that federal law incorporates state law as to the boundary of tidelands adjoining upland patented by the United States whether the state claim be:

1. The line of the neap tides, *e.g.*, *People v. Wil-*

[24] See Corker, *op. cit.*, 42 Wash. L. Rev. 33, 95-96 (1966).

[25] Additionally, *Borax* was decided prior to *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), at a time when the federal courts were still reshaping judge-made law of the states.

liam Kent Estate Co., 51 Cal. Rep. 215 (Dist. Ct. App. 1966);

2. The line of mean high tide, *e.g.*, *Borax, Ltd. v. Los Angeles*, 296 U.S. 10 (1935);

3. The line of vegetation, *e.g.*, *San Francisco v. LeRoy*, 138 U.S. 656 (1891); or

4. Any other line that is a reasonable development of the common law, subject to the condition that such line does not impair the efficacy of the federal grant or the use and enjoyment of the upland property, *cf. Packer v. Bird*, 137 U.S. 661 (1891).

CONCLUSION

For the reasons stated the judgment of the Supreme Court of the State of Washington should be affirmed.

Respectfully submitted,

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September 6, 1967

APPENDIX A

WASH. LAWS OF 1967, CH. 120

AN ACT Relating to seashore conservation; authorizing the establishment on certain state-owned coastal lands of the Washington State Seashore Conservation Area; providing for the administration thereof; prescribing certain powers and duties with respect thereto; defining the jurisdiction of certain state agencies; redesignating and amending section 46.08.180, chapter 12, Laws of 1961 and RCW 46.08.180; adding new sections to chapter 8, Laws of 1965 and to chapter 43.51 RCW; repealing chapter 78, Laws of 1929 (uncodified); and declaring an emergency.

Be It Enacted by the Legislature of the State of Washington:

Section 1. The beaches bounding the Pacific Ocean from the Straits of Juan de Fuca to Cape Disappointment at the mouth of the Columbia River constitute some of the last unspoiled seashore remaining in the United States. They provide the public with almost unlimited opportunities for recreational activities, like swimming, surfing and hiking; for outdoor sports, like hunting, fishing, clamming, and boating; for the observation of nature as it existed for hundreds of years before the arrival of white men; and for relaxation away from the pressures and tensions of modern life. In past years, these recreational activities have been enjoyed by countless Washington citizens, as well as by tourists from other states and countries. The number of people wishing to participate in such recreational activities grows annually. This increasing public pressure

makes it necessary that the state dedicate the use of the ocean beaches to public recreation and to provide certain recreational and sanitary facilities. Non-recreational use of the beach must be strictly limited. Even recreational uses must be regulated in order that Washington's unrivaled seashore may be saved for our children in much the same form as we know it today.

Sec. 2. There is established for the recreational use and enjoyment of the public the Washington State Seashore Conservation Area. It shall include all lands now or hereafter under state ownership lying between Cape Disappointment and Leadbetter Point; between Toke Point and the South jetty on Point Chehalis; and between Damon Point and the Makah Indian Reservation and occupying the area between the present line of ordinary high tide and the line of extreme low tide, as this line now is or may hereafter be located: *Provided,* That no such Conservation Area shall include any lands within the established boundaries of any Indian Reservation.

Sec. 3. Except as otherwise provided in this 1967 amendatory act, the Washington State Seashore Conservation Area shall be under the jurisdiction of the Washington state parks and recreation commission, which shall administer the act in accordance with the powers granted it herein and under the appropriate provisions of chapter 43.51 RCW.

Sec. 4. The Washington state parks and recreation commission shall administer the Washington

State Seashore Conservation Area in harmony with the broad principle set forth in section 1 of this 1967 amendatory act. Where feasible, the area shall be preserved in its present state; everywhere it shall be maintained in the best possible condition for public use. All forms of public outdoor recreation shall be permitted and encouraged in the area, unless specifically excluded or limited by the commission. While the primary purpose in the establishment of the area is to preserve the coastal beaches for public recreation, other uses shall be allowed as provided in this 1967 amendatory act, or when found not inconsistent with public recreational use by the Washington state parks and recreation commission.

Sec. 5. In administering the Washington State Seashore Conservation Area, the Washington state parks and recreation commission shall seek the cooperation and assistance of federal agencies, other state agencies, and local political subdivisions. All state agencies, and the governing officials of each local subdivision shall cooperate with the commission in carrying out its duties. Except as otherwise provided in this 1967 amendatory act, and notwithstanding any other provision of law, other state agencies and local subdivisions shall perform duties in the Washington State Seashore Conservation Area which are within their normal jurisdiction, except when such performance clearly conflicts with the purposes of this 1967 amendatory act.

Sec. 6. Nothing in this 1967 amendatory act

shall be construed to interfere with the powers, duties and authority of the department of fisheries to regulate the conservation or taking of food fish and shellfish. Nor shall anything in this act be construed to interfere with the powers, duties and authority of the state department of game or the state game commission to regulate, manage, conserve, and provide for the harvest of wildlife within such area, notwithstanding the provisions of RCW 9.61.040: *Provided, however*, That no hunting shall be permitted in any state park.

Sec. 7. Section 46.08.180, chapter 12, Laws of 1961 and RCW 46.08.180 are respectively redesignated as part of chapter 8, Laws of 1965 and of chapter 43.51 RCW and are each amended to read as follows:

For the protection and conservation of natural resources, and for the safety and enjoyment of the public using the beaches, the Washington state parks and recreation commission, after agreement with the Washington state highway commission, shall establish reasonable regulations for the use and control of vehicular traffic on and along the ocean beach highways as designated and established under RCW 79.16.130, 79.16.160, and 70.16.170. The Washington state parks and recreation commission shall cooperate with county sheriffs and the state patrol in inforcing such traffic regulations: *Provided*, That automobile driving shall be permitted on the beaches subject to the authority of the department of fisheries to prohibit driving over clam beds.

Sec. 8. Subject to the qualification contained in section 9 of this 1967 amendatory act, any accreted lands now or hereafter under the jurisdiction of the department of natural resources shall remain under the jurisdiction of that department: *Provided*, That no accreted lands shall be sold, leased, or otherwise disposed of, except as herein provided. The department of natural resources may lease the lands within the Washington State Seashore Conservation Area as well as the accreted lands along the ocean in state ownership for the exploration and production of oil and gas: *Provided*, That oil drilling rigs and equipment will not be placed on the seashore conservation area or state-owned accreted lands. Sale of sand from accretions shall be limited to the needs of cranberry growers in the vicinity and shall not be prohibited if found by the department of natural resources to be reasonable, and not generally harmful or destructive to the character of the land; and such sales may be made by the department of natural resources from sands on the Washington State Seashore Conservation Area if approved by the state parks and recreation commission: *Provided further*, That the department of natural resources may grant mining leases for the removal of "black sands" (minerals) from any state-owned nontrust accreted lands between the north jetty at the mouth of the Columbia River and a line due west from the North Head lighthouse: *Provided further*, That net income from such leases shall be transmitted by the department of natural resources to the state treasurer for deposit in the

state parks and parkways account in the general fund for expenditure by the state parks and recreation commission for the development and protection of the Washington State Seashore Conservation Area and state park developments operated in conjunction therewith: *Provided*, The terms and conditions of such mining leases are agreeable to the state parks and recreation commission.

Sec. 9. The Washington state parks and recreation commission, after consultation with and agreement by the department of natural resources, shall have authority to establish sanitary facilities on, and spur roads through, accreted lands otherwise under the jurisdiction of the department of natural resources. The commission may decide where, when, and how such sanitary facilities and spur roads are to be built.

Sec. 10. Chapter 78, Laws of 1929 (uncodified) is hereby repealed: *Provided*, That the title of anyone who has purchased property under this act shall not be affected.

Sec. 11. Where state-owned lands have been formed by natural or artificial causes between the inner or landside boundary of the Washington State Seashore Conservation Area and adjacent privately owned lands, the department of natural resources:

(1) Shall monument or otherwise visibly mark on the ground, as the boundary between such state-owned lands and adjacent lands, the line of ordinary high tide as it existed on the date of Washington statehood; and

(2) Shall thereafter publish notice once a week for not less than six weeks in a newspaper of general circulation in the county where such lands are situated in order that objections to the location of any monument or visible marker may be filed with the state commission for harbor lines at any time within thirty days after the date of the last publication.

Sec. 12. Proceedings before the state commission for harbor lines as provided for in section 11 of this 1967 amendatory act shall be deemed contested cases and subject to all applicable provisions governing contested cases, including judicial review, as is or may be provided by chapter 34.04 RCW.

Sec. 13. The state, its officers and agencies, persons filing objections with the state commission for harbor lines, and successors in interest to the state or persons filing objections shall be barred from contesting the statehood line of ordinary high tide as monumented or marked in compliance with the order of the state commission for harbor lines, or if no objections are filed, as monumented by the department of natural resources.

Sec. 14. There is added to chapter 8, Laws of 1965 and to chapter 43.51 RCW a new subdivision to read as set forth in sections 1 through 9 and 11 through 13 of this 1967 amendatory act.

Sec. 15. This act is necessary for the immediate preservation of the public peace, health, and safety, and the support of the state government and its ex-

isting public institutions, and shall take effect immediately.

Passed the Senate March 8, 1967.

[s] JOHN A. CHERBERG
President of the Senate.

Passed the House March 7, 1967.

[s] DON ELDRIDGE
Speaker of the House.

Approved March 21, 1967

[s] DANIEL J. EVANS
Governor of the State of Washington.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 15

STELLA HUGHES
Petitioner

v.

STATE OF WASHINGTON
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF WASHINGTON

PETITIONER'S REPLY BRIEF

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ON WRIT OF CERTIORARI
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PETITIONER'S REPLY BRIEF

In its brief respondent rephrases its question as follows: "Whether state law may supersede and change the federal and common law?"

The basic question remains: "Whether federal law determines title to imperceptible accretions to upland acquired prestatehood?" The secondary and equally important question: "Whether federal law governs

the method of locating the boundary line between upland and state owned tideland?"

Respondent concedes that the common law and federal governs the boundary between upland still owned by the United States and tide lands owned by the State of Washington; that this is a moving boundary coincidental with the line of mean high tide as defined by the U.S. Coast and Geodetic Survey.

From this concession the respondent's conclusion that the State of Washington has and may supersede the federal law lies a tortuous trail. On page 12 of its brief, respondent says: "Borax Ltd. vs. Los Angeles, 296 U.S. 10 (1935) is not authority for a federally created right to future accretions." Various cases are then cited involving land tenure and use of tide lands. Borax disposes of this phase of respondent's argument distinguishing between the limit and extent of a federal patent and the use of adjoining state tidelands as being those riparian rights governed by local law.

On page 28 of its brief respondent advances the statement that the State of Washington is free to change the mean high tide line rule of Borax since federal law incorporates State law in the interpretation of a United States patent where no contrary rule is demanded by the patent itself subject to the condition that state rules do not impair the efficacy of

the grant or use and enjoyment of the property by the grantee. This statement pinpoints the very essence of petitioner's position. Borax explicitly defines a contrary rule which supersedes any state law or interpretation thereof. The latest federal case relying on Borax is not discussed in respondent's brief, to-wit: U.S. vs. Washington, 294 Fed. 2d. 830 (9th Cir. 1961 cert. den.) holding that local law will not determine the limit of the land conveyed under federal patent or the boundary between patentee and the state. That this is a federal question and the principle is the same where the problem is one of determining whether imperceptible accretions go with the upland.

Washougal Trans. Co. vs. Dalles Nav. Co., 27 Wash. 490-496, 68 Pac. 74, (1902) is cited but the salient holding omitted, to-wit: "What title or right passes under a grant of lands made by the United States is a federal question and the judgment of a state supreme court is within the appellate jurisdiction of the federal supreme court."

Respondent in its reply brief to the United States as amicus curiae says on page 7: "Indeed we would suppose that not even Congress could alter the physical limits of property already conveyed under a federal patent." Petitioner agrees and adds that neither may the State of Washington by statute or judicial legislation. On page 9 of this same brief respondent

also says: "Of course, neither the original thirteen states nor the State of Washington can modify the common law retroactively." Seventy-five years later the lower court in Hughes seeks to establish this result.

On page 29-30 of respondent's brief is said: "Borax does indeed make the issue of an appropriate tideland boundary difficult." And on page 33 of the same brief is this statement: "This court's (Borax) refusal to review the California decision and statutes obviously creates problems of interpretation." Respondent may well have stated that Borax and Hughes are irreconcilable and that Hughes creates the problem which had no existence prior thereto. Respondent finally concedes the obvious and asks that Borax be overruled.

This court had an opportunity to reexamine Borax on the State of Washington's petition for Writ of Certiorari in U.S. vs. Washington, 294 Fed. 2d. 830, (9th Cir. 1961) but refused to do so. We are thus faced with a decision of this court that has remained unchallenged since 1935 construed in the Circuit Court of Appeals in 1961 (U.S. vs. Washington). This opinion was written by Justice Hamley, a former justice of the Washington Supreme Court, applying these same principles to uplands in the State of Washington involving gradual accretions.

Respondent ignores Jones vs. Johnston, 18 Howe 150, 155, cited by the Solicitor General which held that alluvion deposited on the shore of Lake Michigan fell within the shifting boundary of the littoral property, which case was cited in Jefferis vs. East Omaha Land Co., 134 U.S. 178, holding "A shifting water line is just as fixed a boundary in the eye of the law as a permanent object such as a street or wall." [1]

Petitioner's position in brief is that the limit and extent of her patented property and the method of ascertaining the boundary between her upland and state owned tideland is governed by federal law and the Borax and U.S. vs. Washington are dispositive of the question.

Nevertheless respondent dwells at some length upon the proposition that the Washington Constitution, statutes and decisions have established a fixed boundary line and defined the same as the vegetation line as of 1889, date of statehood, to which we make the following comments:

The Washington Territorial Code of 1881 adopted the common law and this has been carried into the present Code, R.C.W. 4.04.010.

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[1] The Oxford English Dictionary defines alluvion as a formation of new land by the slow and imperceptible action of flowing waters.

Washington Constitution Article XVII, Section 1 reads as follows:

> "The State of Washington asserts its ownership to the beds and shore of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes; PROVIDED, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state."

This constitutional provision was construed in Ghione vs. State, 26 Wash. 2d. 635, 175 Pac. 2d. 955, (1946) stating on page 648: "These authorities are sufficient to indicate that Article XVII, Sec. 1, conforms to the general principles of American law relating to control by the state over the beds and shores of its navigable waters, and is not necessarily inconsistent with the established rule that water boundaries vary with the water line." And held "Any shifting of that line by gradual and imperceptible change whether by reliction or accretion results in a corresponding shift in the boundary line." The Washington court in Hughes did not overrule this case, but attempted to distinguish the same on the basis that the former case applied only to navigable rivers, so that we now have two cases in the State of Washington construing this constitutional provision to have diverse results.

We are asked therefore to distingush between navigable waters and navigable rivers in a constitutional provision connecting both. The basis for the distinction does not appear.

Respondent refers to certain Washington statutes, to-wit: Ch. 105 and 110, Laws 1901, both of which contain the provision defining the shore and beach "as now are or hereafter may be." Also the laws of 1889 Ch. 83 as reinacted in Laws of 1927, Ch. 255, which are construed in the Ghione case[2] as relating to accretions situated below the line of ordinary high tide and further to apply to such accretions only after such tidelands have been sold by the state. Also referred to are the laws of 1929 Ch. 78, which authorizes the sale of certain lands "bounded by the line of ordinary high tide as the same is now located or as it may hereafter exist." These statutory provisions can only refer to a moving boundary line.

The Williams Fishing Company cases (Williams Fishing Co. vs. Savidge, 152 Wash. 165, 277 Pac. 459; 155 Wash. 443, 284 Pac. 744) are admittedly confusing, nevertheless, are restricted to tidelands and the final opinion states that the highway reservation had a southern boundary which changed according to the line of ordinary high tide.

Eisenbach vs. Hatfield, 2 Wash. 236, 26 Pac. 539,

[2] Ghione vs. State, 26 Wash. 2d. 635, 175 Pac. 2d 955 (1946).

(1891) contrary to respondent's interpretation does not hold that the upland owner had no right to future accretions but merely held that an upland owner could not prevent improvements on state owned tidelands.

Washougal Trans. Co. vs. Dalles etc. Nav. Co., 27 Wash. 490, 68 Pac. 74, (1902) also held that the effect of a federal patent is governed by federal law and extends to the actual high water line as the true boundary.

Other Washington cases lend no support to respondent's theory of a fixed boundary line and the line of vegetation as establishing that line. Cited are Shelton Logging Co. vs. Gosser, 26 Wash. 126, 66 Pac. 151, and Harkins vs. Del Pozzi, 50 Wash. 2d. 237, 310 Pac. 2d 532. In Harkins the line of mean high tide prior to 1910 could not be established and the later line of ordinary high tide as established by the evidence was not in issue. Therefore the court's holding that the line of ordinary high tide was the vegetation line was dicta. And in support of its dicta cites an Idaho case which involved a non-tidal lake, where the line of vegetation is a practical and unchanging line in the absence of the ebb and flow of the tide.

In Shelton Logging Co. the court did not define the line of "mean high tide."

Respondent also relies on the case of San Francisco vs. LeRoy, 138 U.S. 656, (1891) as establishing the line

of vegetation as the boundary line between uplands and tidelands. This statement by that court was dicta since the court found that no tide lands existed, but did say on page 672: "The duty of the government and its power in the execution of its treaty obligations to protect the claims of all persons — as successor to the Pueblo were superior to any subsequently acquired rights or claims of the State of California." Here the Solicitor General representing the United States seeks to protect a grant made through its sovereign power prior to any subsequently acquired rights of the State of Washington. Petitioner claims a vested right even existing under the proviso of the Washington constitution Art. XVII, Sec. 1:

> "PROVIDED that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state."

On page 11 of respondent's brief in reference to the Hughes case[3] appears the following: "The court rejected the line of mean high tide of the U.S. Coast and Geodetic Survey — and instead approved the past markings of the upper limits (tidelands) by the State Commissioner of Public Lands on the basis of the line of vegetation," and assumes that Mrs. Hughes shares this analysis. To the contrary Mrs. Hughes can only

[3] 67 Wash. 2d. 799; 410 Pac. 2d. 20.

follow the inconsistencies of the Hughes opinion with no understanding of that court's attempted correlation between a theoretical unlocated vegetation line of 1889 and a line of mean high tide the definition of which follows no known theory or principle either engineering or judicial. Mrs. Hughes fully understands that the result of the Hughes opinion gives her land to the State of Washington and the use and sale thereof to its various state agencies and determines the date of taking as of seventy-five years after the event and more than one hundred years after the date of her predecessor's patent.

Ironically, in spite of what respondent says has been the determination of the Commissioner of Public Lands, to-wit: a fixed boundary line as of 1889, that Commissioner has sold thousands of acres of ocean frontage in Grays Harbor County, the western or seaward boundary being described as "lying above the line of ordinary high tide as this same is now located or as it may hereafter exist." This of course is a clear description of a moving boundary line.

In conclusion we can only repeat a statement by Justice Hill in his dissenting opinion in the Hughes case, "To arrive at the result the state desires (and

majority approve), a new, circuitous and rather devious route, rarely explored must be followed."

It is respectfully submitted that the judgment of the court below should be reversed.

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SUPREME COURT OF THE UNITED STATES

No. 15.—October Term, 1967.

Stella Hughes, Petitioner, v. State of Washington. | On Writ of Certiorari to the Supreme Court of Washington.

[December 11, 1967.]

Mr. Justice Black delivered the opinion of the Court.

The question for decision is whether federal or state law controls the ownership of land, called accretion, gradually deposited by the ocean on adjoining upland property conveyed by the United States prior to statehood. The circumstances that give rise to the question are these. Prior to 1889 all land in what is now the State of Washington was owned by the United States, except land that had been conveyed to private parties. At that time owners of property bordering the ocean, such as the predecessor in title of Mrs. Stella Hughes, the petitioner here, had under the common law a right to include within their lands any accretion gradually built up by the ocean.[1] Washington became a State in 1889, and Article 17 of the State's new constitution, as interpreted by its Supreme Court, denies the owners of ocean-front property in the State any further rights in accretion that might in the future be formed between their property and the ocean. This is a suit brought by Mrs. Hughes, the successor in title to the original federal grantee, against the State of Washington as owner of the tidelands to determine whether the right to future accretions which existed under federal law in 1889 was abolished by that provision of the Washington Constitution. The trial court

[1] *Jones* v. *Johnston*, 18 How. 150 (1855); *County of St. Clair* v. *Lovingstone*, 23 Wall. 46 (1874).

upheld Mrs. Hughes' contention that the right to accretions remained subject to federal law, and that she was the owner of the accreted lands. The State Supreme Court reversed, holding that state law controlled and that the State owned these lands. 67 Wash. 2d 799, 410 P. 2d 20 (1966). We granted certiorari. 385 U. S. 1000 (1967). We hold that this question is governed by federal, not state, law and that under federal law Mrs. Hughes, who traces her title to a federal grant prior to statehood, is the owner of these accretions.

While the issue appears never to have been squarely presented to this Court before, we think the path to decision is indicated by our holding in *Borax, Ltd.* v. *City of Los Angeles*, 296 U. S. 10 (1935). In that case we dealt with the rights of a California property owner who held under a federal patent, and in that instance, unlike the present case, the patent was issued after statehood. We held that

> "[t]he question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law." 296 U. S., at 22.

No subsequent case in this Court has cast doubt on the principle announced in *Borax*. See also *United States* v. *Oregon*, 295 U. S. 1, 27–28 (1935). The State argues, and the court below held, however, that the *Borax* case should not be applied here because that case involved no question as to accretions. While this is true, the case did involve the question as to what rights were conveyed by the federal grant and decided that the extent of ownership under the federal grant is governed by federal

law. This is as true whether doubt as to any boundary is based on a broad question as to the general definition of the shoreline or on a particularized problem relating to the ownership of accretion. See *United States* v. *Washington,* 294 F. 2d 830, 832 (C. A. 9th Cir. 1961), cert. denied, 369 U. S. 817 (1962). We therefore find no significant difference between *Borax* and the present case.

Recognizing the difficulty of distinguishing *Borax,* respondent urges us to reconsider it. *Borax* itself, as well as *United States* v. *Oregon, supra,* and many other cases, make clear that a dispute over title to lands owned by the Federal Government is governed by federal law, although of course the Federal Government may, if it desires, choose to select a state rule as the federal rule. *Borax* holds that there has been no such choice in this area, and we have no difficulty in concluding that *Borax* was correctly decided. The rule deals with waters that lap both the lands of the State and the boundaries of the international sea. This relationship, at this particular point of the marginal sea, is too close to the vital interest of the Nation in its own boundaries to allow it to be governed by any law but the "supreme Law of the Land."

This brings us to the question of what the federal rule is. The State has not attempted to argue that federal law gives it title to these accretions, and it seems clear to us that it could not. A long and unbroken line of decisions of this Court establishes that the grantee of land bounded by a body of navigable water acquires a right to any natural and gradual accretion formed along the shore. In *Jones* v. *Johnston,* 18 How. 150 (1855), a dispute between two parties owning land along Lake Michigan over the ownership of soil that had gradually been deposited along the shore, this Court held that "[l]and gained from the sea either by alluvion or dereliction, if the same be by little and little, by small and imperceptible degrees, belongs to the owner of the

land adjoining." 18 How., at 156. The Court has repeatedly reaffirmed this rule, *County of St. Clair* v. *Lovingston*, 23 Wall. 46 (1874); *Jefferis* v. *East Omaha Land Co.*, 134 U. S. 178 (1890),[2] and the soundness of the principle is scarcely open to question. Any other rule would leave riparian owners continually in danger of losing the access to water which is often the most valuable feature of their property, and continually vulnerable to harassing litigation challenging the location of the original water lines. While it is true that these riparian rights are to some extent insecure in any event, since they are subject to considerable control by the neighboring owner of the tideland,[3] this is insufficient reason to leave these valuable rights at the mercy of natural phenomena which may in no way affect the interests of the tideland owner. See *Stevens* v. *Arnold*, 262 U. S. 266, 269–270 (1923). We therefore hold that petitioner is entitled to the accretion that has been gradually formed along her property by the ocean.

The judgment below is reversed, and the case is remanded to the Supreme Court of Washington for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

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[2] In *Ker & Co.* v. *Coulden*, 223 U. S. 268 (1912), Mr. Justice Holmes, writing for the Court, held that under the governing Spanish law, lands added to the shore by accretion in the Philippines belonged to the public domain rather than to the adjacent estate.

[3] It has been held that a State may, without paying compensation, deprive a riparian owner of his common-law right to utilize the flowing water, *St. Anthony Falls Water Power Co.* v. *Water Comm'rs*, 168 U. S. 349 (1897), or to build a wharf over the water, *Shively* v. *Bowlby*, 152 U. S. 1 (1894). It has also been held that the State may fill its tidelands and thus block the riparian owner's natural access to the water. *Port of Seattle* v. *Oregon & W. R. R.*, 255 U. S. 56 (1921).

SUPREME COURT OF THE UNITED STATES

No. 15.—October Term, 1967.

Stella Hughes, Petitioner, v. State of Washington. | On Writ of Certiorari to the Supreme Court of Washington.

[December 11, 1967.]

Mr. Justice Stewart, concurring.

I fully agree that the extent of the 1866 federal grant to which Mrs. Hughes traces her ownership was originally measurable by federal common law, and that under the applicable federal rule her predecessor in title acquired the right to all accretions gradually built up by the sea. For me, however, that does not end the matter. For the Supreme Court of Washington decided in 1966, in the case now before us, that Washington terminated the right to oceanfront accretions when it became a State in 1889. The State concedes that the federal grant in question conferred such a right prior to 1889. But the State purports to have reserved all post-1889 accretions for the public domain. Mrs. Hughes is entitled to the beach she claims in this case only if the State failed in its effort to abolish all private rights to seashore accretions.

Surely it must be conceded as a general proposition that the law of real property is, under our Constitution, left to the individual States to develop and administer. And surely Washington or any other State is free to make changes, either legislative or judicial, in its general rules of real property law, including the rules governing the property rights of riparian owners. Nor are riparian owners who derive their title from the United States somehow immune from the changing impact of these

general state rules. *Joy* v. *St. Louis*, 201 U. S. 332, 342. For if they were, then the property law of a State like Washington, carved entirely out of federal territory, would be forever frozen into the mold it occupied on the date of the State's admission to the Union. It follows that Mrs. Hughes cannot claim immunity from changes in the property law of Washington simply because her title derives from a federal grant. Like any other property owner, however, Mrs. Hughes may insist, quite apart from the federal origin of her title, that the State not take her land without just compensation. *Chicago, Burlington Railroad* v. *Chicago*, 166 U. S. 226, 236–241.

Accordingly, if Article 17 of the Washington Constitution had unambiguously provided, in 1889, that all accretions along the Washington coast from that day forward would belong to the State rather than to private riparian owners, this case would present two questions not discussed by the Court, both of which I think exceedingly difficult. First: Does such a prospective change in state property law constitute a compensable taking? Second: If so, does the constitutional right to compensation run with the land, so as to give not only the 1889 owner, but also his successors—including Mrs. Hughes—a valid claim against the State?

The fact, however, is that Article 17 contained no such unambiguous provision. In that Article, the State simply asserted its ownership of "the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes." In the present case the Supreme Court of Washington held that, by this 1889 language, "[l]ittoral rights of upland owners were terminated." 67 Wash. 2d 799, 816. Such a conclusion by the State's highest court on a question of state law would ordinarily bind this

Court, but here the state and federal questions are inextricably intertwined. For if it cannot reasonably be said that the littoral rights of upland owners were terminated in 1889, then the effect of the decision now before us is to take from these owners, without compensation, land deposited by the Pacific Ocean from 1889 to 1966.

We cannot resolve the federal question whether there has been such a taking without first making a determination of our own as to who owned the seashore accretions between 1889 and 1966. To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court. See *Demorest* v. *City Bank Co.*, 321 U. S. 36, 42–43. Cf. *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95. The Washington court insisted that its decision was "not startling." 67 Wash. 2d 799, 814. What is at issue here is the accuracy of that characterization.

The state court rested its result upon *Eisenbach* v. *Hatfield*, 2 Wash. 236, but that decision involved only the relative rights of the State and the upland owner in the tidelands themselves. The *Eisenbach* court declined to resolve the accretions question presented here. This question was resolved in 1946, in *Ghione* v. *State*, 26 Wash. 2d 635. There the State asserted, as it does here, that Article 17 operated to deprive private riparian owners of post-1889 accretions. The Washington Su-

preme Court rejected that assertion in *Ghione* and held that, after 1889 as before, title to gradual accretions under Washington law vested in the owner of the adjoining land. In the present case, 20 years after its *Ghione* decision, the Washington Supreme Court reached a different conclusion. The state court in this case sought to distinguish *Ghione:* The water there involved was part of a river. But the *Ghione* court had emphatically stated that the same "rule of accretion . . . applies to both tidewaters and fresh waters." 26 Wash. 2d 635, 645. I can only conclude, as did the dissenting judge below, that the state court's most recent construction of Article 17 effected an unforeseeable change in Washington property law as expounded by the State Supreme Court.

There can be little doubt about the impact of that change upon Mrs. Hughes: The beach she had every reason to regard as hers was declared by the state court to be in the public domain. Of course the court did not conceive of this action as a taking. As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment.